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No. (1) 07-575

In The
Supreme Court of the United States

THOMAS CARROLL, WARDEN OF
THE DELAWARE CORRECTIONAL CENTER,

Petitioner,

v.

DAVID STEVENSON, MICHAEL
MANLEY, MICHAEL L. JONES,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two of the three Respondents (Stevenson and Manley) were sentenced to death for committing first-degree murder. After their sentences were vacated and their cases were remanded for resentencing, prison officials transferred them from death row to a highly-secure housing area known as the Security Housing Unit (SHU). The third Respondent (Jones), transferred to SHU after a prison disturbance, was awaiting trial for first-degree murder. The questions presented are:

1. Whether, as the Third Circuit held, Respondents were entitled under the Due Process Clause to receive an explanation of the reason for their transfer and an opportunity to respond.

2. Whether, as the Third Circuit held, Respondents stated a substantive due process claim upon which relief could be granted because they alleged that their transfer to SHU constituted punishment.

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JURISDICTION

The court of appeals entered its opinion and judgment on July 30, 2007. No rehearing petition was filed below. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provision is the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which states as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

On March 4, 2004, the Respondents – three prisoners housed at the Delaware Correctional Center ("DCC") – filed an action under 42 U.S.C. § 1983 against Warden Thomas Carroll, alleging violations of their substantive and procedural due process rights. The United States District Court for the District of Delaware dismissed their complaint. The United States Court of Appeals for the Third Circuit reversed, holding that Respondents stated valid substantive and procedural due process claims sufficient to survive a motion to dismiss.

A. Factual Background

1. The three Respondents in this case are David Stevenson, Michael Manley, and Michael L. Jones. At the time of their complaint, Respondents Stevenson and Manley were awaiting resentencing. Both had been convicted and sentenced to death in January 1997, but their sentences were vacated and remanded on or about May 30, 2001. At that time, they were moved off death row and into the Security Housing Unit ("SHU"). Stevenson was moved from the SHU to a less restrictive pre-trial facility in December 2003, but was returned to the SHU in January 2004.

According to the complaint, neither one of them received a hearing or explanation for their transfers into the SHU. They were both subsequently resentenced to death on February 3, 2006.

The third Respondent, Jones, was awaiting trial for first-degree murder at the time he filed his complaint. Following an alleged prisoner riot at Gander Hill Prison in Wilmington, Delaware, he and several other inmates were moved to the SHU on or about February 19, 2003. Jones asserted that, like Stevenson and Manley, he was not afforded an explanation or hearing regarding his transfer into more restrictive housing. He did, however, state that he was alleged to have been involved in the riot at Gander Hill. Jones was subsequently found guilty of first-degree murder and sentenced to life imprisonment on September 16, 2005.

Prior to their resentencing (in the case of Stevenson and Manley) and conviction (in the case of Jones), the Respondents filed their § 1983 actions. They sought relief in the form of a transfer into the general prison population, monetary damages, and the establishment of a system of review for transfers of pretrial detainees into the SHU.

2. The Delaware Correctional Center (DCC) is the largest prison in Delaware, and is located in Smyrna, Delaware (10 miles north of Dover). It houses both convicted and sentenced inmates, and it holds the State's only death row housing area, which is maximum security. DCC also houses pretrial

detainees (a category which, under Third Circuit precedent, includes inmates whose sentences but not convictions have been overturned).[1] DCC provides two levels of housing for pretrial detainees: the general population is housed in the B Building pretrial unit, and security-risk detainees are housed in the Security Housing Unit (SHU) in Building #18. (App. 53). SHU is more restrictive than the general population pretrial, but detainees in SHU are permitted access to attorneys, the law library, commissary, recreation, and grievance procedures. (App. 54). Upon receiving a sentence, the prisoners will go through the classification process. (App. 54).

In their complaint, Stevenson and Manley alleged that they had been housed in SHU for 32 months since being off death row. (App. 34, 37). Contrasting the conditions in the SHU with pretrial general population conditions (App. 34-37), they characterized the transfers as "punitive." (App. 34). At no place in the complaint, however, did they allege any motive by any official to punish them or any statement by any official indicating an intent to punish them.

The complaint failed to address the conditions in death row or compare them to the conditions in SHU.

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[1] Prisoners who have been convicted but not yet sentenced are deemed pretrial detainees in the Third Circuit. App. 7 (citing *Cobb v. Aytch*, 643 F.2d 946, 962 (3d Cir. 1981); *Fuentes v. Wagner*, 206 F.3d 335, 341 (3d Cir.), *cert. denied*, 531 U.S. 821 (2000).

In fact, the complaint acknowledged that Stevenson and Manley's transfer off death row and return to pretrial detainee status after their sentences were vacated was pursuant to "standard practice" at DCC. (App. 34). The complaint alleged that "other inmates . . . in the same situation" were moved to general population for detainees instead of SHU. (App. 8). The complaint failed to specify whether the "same situation" meant having a sentence vacated or having a death sentence vacated.

An affidavit by the Warden that was attached to his motion to dismiss described the reasons for the Respondents' placement in SHU. (App. 52). The Warden's affidavit stated that detainees considered a security risk are housed in the SHU pretrial area. Because all three plaintiffs were charged with first-degree murder, and two of them had been convicted of that charge, they were considered highly dangerous. Stevenson and Manley were considered especially dangerous because they were subject to being sentenced to death again. Therefore, they were assigned to the pretrial area of SHU. (App. 53).

B. Proceedings Below

The district court held that the Respondents' complaint failed to state a claim upon which relief can be granted. (App. 23). It found that their transfer into the SHU was within the scope of the prison officials' authority with respect to prison management. And, relying on *Hewitt v. Helms*, 459 U.S. 460

(1983), and *Sandin v. Conner,* 515 U.S. 472, 482-83 (1995), the court found no state law or regulation conferring a liberty interest upon the Respondents. (App. 23).

Respondents appealed to the Third Circuit. They presented two arguments as to why their complaint should have survived the motion to dismiss. First, they argued that they sufficiently asserted a liberty interest in being free from punishment prior to imposition of sentence. Second, they asserted that they should have been afforded notice of their transfer and an opportunity to respond. The Warden disputed the sufficiency of their substantive and procedural due process claims, arguing that the gist of their complaint was that they had a right to be in general population, for which they had no cognizable liberty interest.

The court of appeals held that the Respondents were entitled to procedural due process at the time they were transferred to SHU. (App. 14). This holding applied to Stevenson and Manley as well as to Jones, even though Stevenson and Manley had been housed in death row before their transfer. The court reasoned that "[a]lthough pretrial detainees do not have a liberty interest in being confined in the general prison population, they do have a liberty interest in not being detained indefinitely in the SHU without explanation or review of their confinement." (App. 14). The court ruled, therefore, that detainees who are administratively transferred are generally entitled to procedural due process: "Prison officials must

provide detainees who are transferred into more restrictive housing for administrative purposes . . . an explanation of the reason for their transfer as well as an opportunity to respond." (App. 15).

The court of appeals also held that the complaint sufficiently alleged a substantive due process claim to survive a motion to dismiss. The court found that the reasoning of *Sandin v. Connor*, 515 U.S. 472 (1995), had no application to the Respondents in this case, who are all deemed pretrial detainees under Third Circuit precedent. Relying upon *Bell v. Wolfish*, 441 U.S. 520 (1979), the court stated that the issue was whether prison officials were punishing the Respondents when they transferred them to the SHU. Noting that Stevenson and Manley asserted they were not treated the same as other similarly situated inmates, the court found that one reasonable inference from the complaint was that the Respondents' confinement in SHU was arbitrary and, therefore, punitive. (App. 11).[2]

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[2] In a footnote, the court stated that the Respondents' request for a system of review for transfers of pretrial detainees into SHU was moot because, at the time of this decision, Stevenson and Manley were back on death row and Jones was housed in the part of SHU for sentenced inmates. However, the court viewed the plaintiffs' claims for monetary damages and relief in the form of a transfer into the general population as viable. (App. 3 n.1). The court also ruled that the determination of qualified immunity should be initially decided by the district court. (App. 19).

REASONS FOR GRANTING THE PETITION

It has been nearly 30 years since this Court issued its seminal opinion on the rights of pretrial detainees: *Bell v. Wolfish*, 441 U.S. 520 (1979). Today, the circuit courts are going in different directions on the scope of detainees' rights under the Due Process Clause, each in reliance upon *Bell*. It is time for this Court to provide additional guidance on the issue.

The instant case is the appropriate vehicle to address the issue, for it illustrates the conflict and confusion among the circuits, as well as a departure from the original precepts of *Bell*. The Third Circuit has announced a sweeping rule that *all* pretrial detainees have a liberty interest entitling them to notice and opportunity to respond *any* time they are transferred to more restrictive housing. Applied here, the Third Circuit rule led to the following, utterly illogical, outcome: convicted murderers moved from death row to a highly secure housing area for pretrial detainees, pending a determination in state court as to whether they should receive death sentences or life imprisonment, are deemed to have procedural due process rights that are triggered by the move. The same result would not obtain in several other federal courts of appeal, which have concluded in conflict with the Third Circuit that administrative transfers do not implicate pretrial detainees' liberty interests.

The Third Circuit's substantive due process ruling also warrants this Court's review. The Third Circuit held that, because the complaint asserted that

the Respondents were not treated the same as other similarly situated inmates, the complaint stated a claim for a violation of their substantive due process rights. It is highly implausible, however, that a death row inmate is being punished when he is transferred *out of* death row. The complaint did not assert that the new housing unit is any more restrictive than death row. Nor did it identify any fact supporting the Respondents' allegation of dissimilar treatment. If such a complaint can survive a motion to dismiss, motions to dismiss will never succeed on this issue. It should not be that easy for prisoners to force prison officials to go through discovery.

I. CERTIORARI SHOULD BE GRANTED TO REVIEW THE THIRD CIRCUIT'S RULING THAT THE DUE PROCESS CLAUSE REQUIRES PRISON OFFICIALS TO PROVIDE PRETRIAL DETAINEES WITH NOTICE AND AN OPPORTUNITY TO RESPOND WHENEVER THE DETAINEES ARE TRANSFERRED TO MORE RESTRICTIVE HOUSING UNITS.

A. The Circuits Are in Conflict over This Issue.

1. The circuits are in conflict over whether administrative transfers of detainees implicate procedural due process.

a. Numerous precedential opinions from other courts of appeal, most notably the Sixth and Seventh

Circuits, have held that administrative transfers of detainees generally do not implicate procedural due process concerns. *See Martucci v. Johnson*, 944 F.2d 291 (6th Cir. 1991); *Holly v. Woolfolk*, 415 F.3d 678, 679 (7th Cir. 2005); *Higgs v. Carver*, 286 F.3d 437, 438 (7th Cir. 2002); *Zarnes v. Rhodes*, 64 F.3d 285 (7th Cir. 1995); *Crane v. Logli*, 992 F.2d 136 (7th Cir. 1993).

Detainees charged with murder are commonly housed in maximum security, with many restrictions and few privileges, and their due process challenges are commonly rejected by the courts. In *Crane v. Logli*, 992 F.2d 136 (7th Cir. 1993), the Seventh Circuit rejected a detainee's procedural due process claim on facts similar to those alleged here. The detainee was held in a maximum security prison during the period after his conviction was reversed by an appellate court and pending retrial. The lower court dismissed the complaint and the Seventh Circuit affirmed the dismissal. Applying the *Bell v. Wolfish* due process analysis, the court found no liberty interest was implicated. *Id.* at 139. Although the Seventh Circuit questioned whether the plaintiff was really a pretrial detainee, it also relied on the analysis of the district court in *Getch v. Rosenbach*, 700 F.Supp. 1365, 1370 (D.N.J. 1988). In *Getch*, the plaintiff's detainee status was accepted by the court but found subordinate to the fact that the Due Process Clause simply did not create a liberty interest under those circumstances. Although the plaintiff in

Getch failed to dispute that he lacked a liberty interest under the Due Process Clause of the Fourteenth Amendment, the district court's analysis clearly demonstrated the court's belief that such an interest was absent. *Id.* at 1370. The Seventh Circuit agreed with that view. *See also Franklin v. True*, 76 F.3d 381 (table), 1996 WL 43532 (7th Cir. Jan. 30, 1995).

The Sixth Circuit has likewise rejected the notion that detainees have a liberty interest in the security level of their confinement. In *Martucci v. Johnson*, 944 F.2d 291 (6th Cir. 1991), the Sixth Circuit rejected the claim of a liberty interest in the context of a short-term disciplinary confinement for a detainee. The lower court found that the confinement was based on a security decision and granted summary judgment for the defendants. Applying *Bell v. Wolfish*, the Sixth Circuit embraced the lower court's reliance on the principle of deference to the judgment of prison officials as to security decisions. The appellate court stated: "The federal Constitution, standing alone, does not confer upon prisoners a 'liberty interest' in any particular form of confinement." *Id. See also Stafford v. Edmonds*, 76 F.3d 380 (table), 1996 WL 38222 (6th Cir. Jan. 30, 1996).

b. Through unpublished opinions, the Second and Ninth Circuits have also rejected the notion that the Due Process Clause grants pretrial detainees a liberty interest in the security level of their housing assignment. In *Garcia v. Pugh*, 8 F.3d 26 (table), 1993 WL 362268 (9th Cir. Sept. 17, 1993), the Ninth Circuit held that a detainee's placement in maximum

security did not violate his procedural due process rights because he had no liberty interest in a particular classification. The Ninth Circuit reached the same result in *Alexander v. Frank*, 967 F.2d 583 (table), 1992 WL 149679 (9th Cir. June 30, 1992), in which the court affirmed summary judgment for prison officials where a detainee alleged his classification to maximum security violated the Due Process Clause. Applying *Bell v. Wolfish*, the appellate court held that prisoners "do not have a constitutional right to a particular classification status." *Id.* at *1. The court found a reasonable relationship between the prisoner's murder charges and his classification to maximum security. *Id. See also Miramontes v. Chief of Department of Corrections*, 86 Fed. Appx. 325 (9th Cir. 2004).

The Second Circuit has also rejected the claim that classifying a detainee to maximum security implicates any liberty interest under the due process clause. In *McMillian v. Cortland County Correctional Facility*, 198 F.3d 234 (table), 1999 WL 753336 (2d Cir. Sept. 14, 1999), the Second Circuit affirmed summary judgment for prison officials after finding the classification was rationally related to a legitimate government interest. The appellate court stated that the classification comported with *Bell v. Wolfish* and "did not otherwise impair any liberty interest that would trigger due process requirements." *Id.* at *1.

Although many of these cases were decided at the summary judgment stage, their analysis applies

equally at the motion-to-dismiss stage. The courts reasoned as follows: (1) the Due Process Clause does not create a liberty interest with respect to a transfer to administrative segregation or maximum security, (2) if such an interest exists, it is because it is created by state law, and (3) where state law creates no liberty interest, none exists. In this case, the district court was well aware, through precedent, that Delaware has never provided a liberty interest with respect to housing transfers for administrative or classification reasons, and so it was entitled to dismiss the procedural due process claim. In reversing the district court, the Third Circuit departed from the sound reasoning of several other federal courts of appeals.

2. The circuits are in conflict over whether *Sandin v. Connor* applies to administrative transfers of detainees.

In *Sandin v. Conner*, 515 U.S. 472, 484 (1995), this Court held that a State creates liberty interests protected by the Due Process Clause only when it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." In the decision below, the Third Circuit found that *Sandin* had no application to this action because the Respondents were, under that court's precedents, deemed "pretrial detainees." The Third Circuit's opinion deepens an existing conflict over whether *Sandin* applies to determinations of liberty interests

of detainees. Three circuits have held that it does; four circuits agree with the Third Circuit that it does not. This conflict over how to analyze detainees' procedural due process claims further highlights the need for this Court's review.

The Second, Third, Seventh, and Ninth Circuits have held that *Sandin* procedural due process analysis does not apply to detainees. In *Rapier v. Harris,* 172 F.3d 999, 1004-05 (7th Cir. 1999), for example, the Seventh Circuit distinguished *Sandin* on the ground that pretrial detainees "are not under a sentence of confinement, and therefore it cannot be said that they ought to expect whatever deprivation can be considered incident to serving such a sentence." *See also Benjamin v. Fraser*, 264 F.3d 175, 188-89 (2d Cir. 2001) (same); *Fuentes v. Wagner,* 206 F.3d 335, 341-42 n.9 (3d Cir.) (same), *cert. denied,* 531 U.S. 821 (2000); *Resnick v. Hayes,* 213 F.3d 443, 448 (9th Cir. 2000) (same); *Mitchell v. Dupnik,* 75 F.3d 517, 523 (9th Cir. 1996) (same).

By contrast, the Sixth, Eighth, and District of Columbia Circuits have explicitly applied the *Sandin v. Connor* analysis to detainee due process claims, even in the disciplinary segregation context. *See Polk v. Parnell*, 132 F.3d 33 (table), 1997 WL 778511 (6th Cir. Dec. 8, 1997); *Johnson v. Esry*, 210 F.3d 379 (table), 2000 WL 375269 (8th Cir. Apr. 13, 2000); *Rae v. Henderson*, 1995 WL 759466 (D.C. Cir. Nov. 17, 1995). In *Polk*, the Sixth Circuit found that allegations by a pretrial detainee of being placed in disciplinary segregation for four days without due process

did not constitute an atypical and significant hardship under *Sandin*. In *Johnson*, the Eighth Circuit affirmed the dismissal of a detainee's complaint, finding his due process claim lacked merit because eight days in a solitary cell did not amount to an atypical and significant deprivation under *Sandin*. And in *Rae*, the District of Columbia Circuit granted a motion for summary affirmance, finding that a detainee's due process rights were not violated by placement in protective custody because the confinement did not constitute an atypical and significant hardship under *Sandin*.

Several district courts have remarked upon the confusion that exists in this area. *See Rodriguez v. Penobscot County Jail*, 2001 WL 376453 at *3-*4 (D.Me. Apr. 11, 2001) (finding law is unclear for purposes of qualified immunity); *Cornett v. Webb*, 2004 WL 3437504 at *5 (E.D. Ky. May 13, 2004) (noting conflict among circuits and applying *Bell*, *Hewitt v. Helms*, 459 U.S. 460 (1983), and *Sandin* analysis to find no liberty interest); *Walton v. NFN Douglas*, 2006 WL 1751735 at *5 (D.S.C. June 23, 2006) (noting "conflicting views" of whether disciplinary segregation of detainee entitles him to due process).

B. The Third Circuit's Ruling Conflicts with This Court's Decisions.

In viewing the issue as whether pretrial detainees have a right to procedural due process when they

are administratively transferred, the Third Circuit framed the issue in an overly general manner.[3] The issue is, more precisely, whether *these* pretrial detainees had a right to due process under these circumstances. That is, whether pretrial detainees convicted of first-degree murder and housed on death row, or charged with first-degree murder, are entitled to due process when transferred to another high security area. This Court's decisions establish that they are not.

1. This Court has always rejected the view that, in the absence of a state-law liberty interest, the Due Process Clause requires procedural protection for prison transfers.

Historically, this Court has found that prisoners have a liberty interest in administrative prison transfers and classification decisions only where state law created such an interest. *See Meachum v. Fano*, 427 U.S. 215, 228-29 (1976); *Montanye v. Haymes*, 427 U.S. 236 (1976); *Olim v. Waukinekona*, 461 U.S. 238 (1983). In contexts other than prisoner transfers and classification, this Court has found that the Due Process Clause itself may be the source of a liberty interest in certain circumstances where some form of

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[3] The court stated: "Prison officials must provide detainees who are transferred into more restrictive housing for administrative purposes . . . an explanation of the reason for their transfer as well as an opportunity to respond." (App. 15).

grievous loss is imposed. *See Vitek v. Jones*, 445 U.S. 480, 494 (1980) (stigmatizing consequences of transfer to mental hospital coupled with mandatory behavior modification as treatment for mental illness gave rise to liberty interest). In *Sandin v. Connor*, 515 U.S. 472 (1995), the Court did not reject state law as the general source of liberty interests for prisoner due process claims, but restricted such state-law created liberty interests to the context in which an atypical and significant hardship relative to the ordinary incidents of prison life is alleged.

Even though the decisions of this Court in *Meachum v. Fano*, *Montayne v. Haymes*, and *Sandin v. Connor* were partially premised upon the fact of conviction, they were also premised upon the absence of state law creating a liberty interest, as well as upon the historical discretion of prison officials in making such decisions and the limited role of the federal judiciary with respect to prison management. These latter factors apply with equal strength in the detainee context as with convicted and sentenced inmates.

The district court in this action carefully noted the lack of any state law or regulation creating a liberty interest for the Respondents here. It also noted that prison regulations affirmatively gave the Warden a great amount of discretion: "DOC Procedure 3.31 explicitly states that the warden has virtually unlimited discretion in placing inmates within the prison 'in any security/custody level.'" (App. 42). The court also relied upon *Brown v. Cunningham*,

730 F.Supp. 612, 614 (D.Del. 1990), a District of Delaware precedent that found no state-law created liberty interest in the Delaware prison system. Thus, the most important source of a liberty interest according to *Hewitt v. Helms* and *Sandin v. Connor* – state law – is utterly lacking here.

2. There is no reasonable expectation of general population housing conditions here.

In *Sandin*, this Court approached the issue of the existence of a liberty interest from the perspective of what conditions a prisoner may reasonably expect to be subjected to in the prison environment: "Although we do not think a prisoner's subjective expectation is dispositive of the liberty interest analysis, it does provide some evidence that the conditions suffered were expected within the contour of the actual sentence imposed." 515 U.S. at 486 n.9. The fact that a convicted and sentenced prisoner may reasonably expect to face somewhat harsh conditions as part of the punishment counseled against a finding of a liberty interest even where state law could have been said to provide it.

Here, the logic of punishment does not apply, but the question of what housing conditions a detainee charged with or convicted of first-degree murder may reasonably expect is still relevant. The reasonable expectations of a person claiming to have suffered a

deprivation due to state action are always an important factor in liberty interest analysis. Thus, in *Vitek v. Jones, supra,* the Court noted approvingly the district court's conclusion that:

> This "objective expectation, firmly fixed in state law and official penal complex practice," that a prisoner would not be transferred unless he suffered from a mental disease or defect that could not be adequately treated in the prison, gave Jones a liberty interest that entitled him to the benefits of appropriate procedures in connection with determining the conditions that warranted his transfer to a mental hospital.

Id. at 489-90.

A detainee convicted of first-degree murder is not in the same position as a detainee charged with shoplifting. However, the court of appeals' decision would treat them as the same because they are both detainees. Some consideration should be paid to what security constraints a detainee should reasonably expect given the circumstances of his case. A detainee convicted of first-degree murder and possibly subject to having the death penalty reimposed should expect to be housed in a restrictive, high-security environment. If he is placed in general population, he may consider himself fortunate, but any expectation of that level of security housing is not reasonable and should not be the basis for a finding of a liberty interest.

3. A transfer from one maximum-security housing area to another should not require procedural due process.

Another pertinent factor is what the conditions were in the environment from which the detainee was transferred. Where a detainee convicted of first-degree murder has been housed in death row, and is being moved to another high security area, it is difficult to see how his prior residence in death row conferred a liberty interest upon him. As this Court stated in *Washington v. Harper*, 494 U.S. 210, 222 (1990), "[t]he extent of a prisoner's right under the Clause to avoid [detrimental state action] . . . must be defined in the context of the inmate's confinement."

In *Sandin*, this Court stated that "lawful incarceration" results in the necessary withdrawal or limitation of many privileges and rights. 515 U.S. at 485. A detainee convicted of murder, but not yet sentenced, is as lawfully incarcerated as is a sentenced inmate. Even in terms of the punishment of convicted and sentenced inmates, this Court noted that the process "effectuates prison management and rehabilitative goals." *Id.* While rehabilitation may be inapplicable to detainees, this Court stated in *Bell v. Wolfish, supra,* that the prison management considerations are the same for convicts and detainees. 441 U.S. at 546 n.28. The reasoning of *Sandin* should apply to a detainee, especially one who has been convicted of first-degree murder.

Nothing in *Wilkinson v. Austin*, 545 U.S. 209 (2005), is to the contrary. In *Austin*, this Court held that extended confinement in the Ohio supermax prison created an atypical and significant hardship because of its indefinite duration, and the fact that placement there disqualified an otherwise eligible inmate for parole consideration. *Id.* at 224. There is no allegation in this case that the transfer to SHU had any detrimental effect upon the sentence that the Respondents would receive or serve, including future parole consideration. And it is undisputed that Respondents Stevenson and Manley were only placed in pretrial SHU pending their resentencing to either death or life imprisonment.

C. This Issue Is Important to the Administration of State Prisons.

The Third Circuit's holding creates a procedural due process right for all pretrial detainees, including convicted but unsentenced prisoners, at or about the time of transfer to a higher security housing area than general population, regardless of the reason for the transfer.[4] The court ruled that "[p]rison officials must provide detainees who are transferred into more restrictive housing for administrative purposes . . . an

[4] The court of appeals seemed to assume that pretrial SHU housing is more restrictive than death row, even though this was not alleged. The complaint focused on a comparison of SHU to the general population conditions, as the court itself noted. (App. 12).

explanation of the reason for their transfer as well as an opportunity to respond." (App. 15). The holding contains no limits: it means that *all* detainees being moved to pretrial SHU will have to receive written notice of the reason for their housing status, with opportunity for them to rebut those reasons, regardless of the reason for their transfer or where they were housed before. Although this rule will aid detainees only marginally, it will cause prison officials considerable time and effort.

Given that the reason for Respondents' confinement in SHU is that they are either convicted of or charged with first-degree murder, there is nothing that notice to them and a paper review of their response would accomplish. It would become a meaningless paperwork task, in addition to already-considerable paperwork obligations, and a further distraction from core responsibilities to protect the lives of prison staff and other inmates. While obligations such as the one imposed in this case may appear in isolation not to be onerous, collectively as such obligations grow in the expanding universe of prisoner rights they can become an enormous distraction from the central tasks of managing a prison or detention facility.

As this Court stated in *Meachum v. Fano*, 427 U.S. 215, 228-29 (1976):

> Holding that arrangements like this [prison transfers] are within the reach of the procedural protections of the Due Process Clause

> would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges. We decline to so interpret and apply the Due Process Clause. The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States.

If every detainee housing transfer allegedly resulting in more onerous conditions is deemed to trigger due process protection, as the Third Circuit holds, then indeed the Due Process Clause has been placed astride the day-to-day functioning of state prisons.

II. CERTIORARI SHOULD BE GRANTED TO REVIEW THE THIRD CIRCUIT'S RULING THAT RESPONDENTS' SUBSTANTIVE DUE PROCESS RIGHTS WERE VIOLATED WHEN THEY WERE TRANSFERRED TO THE SECURITY HOUSING UNIT.

In *Bell v. Wolfish*, this Court held that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." 441 U.S. at 535-36. That is not all the Court stated in *Bell*. The Court also set forth three important principles that bear on this case: (1) the presumption of innocence is a doctrine for allocating the burden of proof in criminal trials, and has no bearing on the rights of a detainee concerning prison

conditions (*id.* at 533); (2) security and other institutional considerations are generally the same with respect to convicted inmates and pretrial detainees, as pretrial detainees may be as dangerous or even more so than convicted inmates (*id.* at 546 n.28); and (3) the courts should play a "very limited role" with respect to detention facilities and, where there is a reasonable relationship between a restriction and a legitimate governmental purpose, restrictions do not without something more amount to punishment (*id.* at 539, 547-48). *See also Block v. Rutherford*, 468 U.S. at 584, 589. Given these principles, it is difficult to reconcile the recent expansion of detainee rights in the Third Circuit with *Bell*.

In the instant case, there is no allegation in the complaint of an express intent to punish by Warden Carroll. The gist of the complaint (as to Stevenson and Manley) is that convicted murderers who have been moved to a pretrial area with conditions little or no better than those in death row would like to be housed in the general population. At one place in the complaint, Respondents characterize their transfers to SHU as "punitive." (App. 34). The use of this term should not, by itself, lead to the conclusion that the complaint states a claim for a substantive due process violation. The court of appeals, more focused on its own broad definition of "pretrial detainee" than the analysis of *Bell*, refuses to incorporate into its analysis any recognition that one should expect first-degree murderers, and those charged with first-degree murder, to be placed in a highly secure housing area.

Nor should it matter that not every person charged with first-degree murder has been placed in SHU: the reasonable relationship between security concerns and highly secure housing exists regardless of past practice.

This Court expanded on the nature of the *Bell v. Wolfish* test in a subsequent case, *Block v. Rutherford,* 468 U.S. 576 (1984). In *Block,* this Court stated that the due process/detainee reasonable relationship test is not a balancing test. That is, the trial court may not balance the detainee's deprivations against the state's interest and determine whether the restrictions are justified. If there is a reasonable relationship between the asserted state interest and the restrictions about which the detainee complains, the trial court is obligated to defer to the professional judgment of prison officials:

> When the District Court found that many factors counseled against contact visits, its inquiry should have ended. The court's further "balancing" resulted in an impermissible substitution of its view on the proper administration of Central Jail for that of the experienced administrators of that facility. Here, as in *Wolfish*, "[i]t is plain from [the] opinions that the lower courts simply disagreed with the judgment of [the jail] officials about the extent of the security interests affected and the means required to further those interests."

468 U.S. at 589.

In the instant action, the Respondents complain that they are held in a high security housing area that is highly restrictive. The asserted state interest is prison security. (*See* affidavit of Warden Tom Carroll at App. 53). Respondents admit that they are charged with capital crimes. (App. 33). The professional judgment of the prison officials is that persons charged with first-degree murder are likely to be highly dangerous individuals, and therefore they present a security risk. Because they are deemed to present a security risk, they are housed in a high security unit of SHU.

The reasonable relationship between the charges against Respondents and the state's interest in prison security is obvious. Only by engaging in some form of balancing can a court alter the required analysis and its necessary outcome. However, such balancing is prohibited. The issue of security, above all others, is one where the professional judgment of prison officials must be respected and judicially affirmed. The housing of alleged murderers is a situation where the issue of security is more clearly implicated than in any other.

In fact, some states do not transfer out of death row those inmates who have been convicted of first-degree murder but are being resentenced. The officials here moved Respondents Stevenson and Manley to the pretrial area of SHU to comport with the Third Circuit's position that they had, by having their death sentences vacated, become like pretrial detainees. From a security perspective, however, nothing

changed with respect to Stevenson and Manley. They remained equally dangerous as when they were sentenced to death.

Finally, if every prisoner complaint using the term "punitive" or alleging that somebody else was treated differently is deemed to state a claim, regardless how insubstantial, the courts will not play a "very limited role" with respect to prison management. The prisoners have all the time in the world to litigate everything they do not like. The prison officials do not. If the prison officials must litigate every detainee housing decision where a detainee uses the term "punitive" in a complaint, or where he alleges others were treated better, the distraction created thereby will be substantial – not limited.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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495 F.3d 62

United States Court of Appeals,
Third Circuit.

David STEVENSON; Michael Manley;*
Michael L. Jones, Appellants
v.
Thomas CARROLL, Warden.
*Reinstated per clerk's order of 08/09/05.

No. 05-1088.

Argued June 4, 2007.
Filed: July 30, 2007.

Leon F. DeJulius, Jr. (Argued), Jones Day, Pittsburgh, PA, Counsel for Appellants.

Richard W. Hubbard (Argued), Department of Justice, Wilmington, DE, Counsel for Appellee.

Before: SMITH, COWEN, and SILER, Circuit Judges.*

OPINION OF THE COURT

SMITH, Circuit Judge.

Three detainees in the Delaware Correctional System – David Stevenson, Michael Manley, and Michael L. Jones – filed an action under 42 U.S.C. § 1983 against Warden Thomas Carroll, alleging

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* The Honorable Eugene E. Siler, Senior Circuit Judge for the United States Court of Appeals for the Sixth Circuit, sitting by designation.

violations of their substantive and procedural due process rights. The District Court dismissed their complaint. On appeal, they assert that their allegations of placement in restrictive confinement state valid substantive and procedural due process claims sufficient to survive a motion to dismiss. We agree, and remand the case to the District Court.

I.

At the time of their complaint, Stevenson and Manley were awaiting resentencing. Both had been convicted and sentenced to death in January 1997, but their sentences were vacated and remanded on or about May 30, 2001. At that time, they were moved off death row, and into the Security Housing Unit ("SHU"). Stevenson was moved from the SHU to a less restrictive pre-trial facility in December 2003, but was returned to the SHU in January 2004. Neither one of them received a hearing or explanation for their transfers into the SHU. They were both subsequently re-sentenced to death on February 3, 2006.

Jones was awaiting trial at the time of the complaint. Following a disruption at Gander Hill Prison in Wilmington, Delaware, he and several other inmates were moved to the SHU on or about February 19, 2003. Jones asserts that, like Stevenson and Manley, he was not afforded an explanation or hearing regarding his transfer into more restrictive housing. He does, however, state that he was alleged to have been involved in the riot at Gander Hill. Jones

was subsequently found guilty of first-degree murder and sentenced to life imprisonment on September 16, 2005.

The appellants seek relief in the form of a transfer back into the general prison population, monetary damages, and the establishment of a system of review for transfers of pretrial detainees into the SHU.[1]

The Warden filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which was granted on December 7, 2004. The District Court held that the detainees' transfer out of the general prison population into the SHU for nonpunitive reasons was within the scope of the prison officials' authority with respect to prison management. In its ruling, the District Court relied upon *Sandin v. Conner,* 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). The plaintiffs appealed from this order on January 4, 2005.[2] Review of a dismissal of a complaint under Rule 12(b)(6) is plenary. *Lake v. Arnold,* 112 F.3d 682, 684-85 (3d Cir.1997).

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[1] Stevenson and Manley are now on death row, and Warden Carroll indicates that Jones is now housed in the part of the SHU reserved for sentenced inmates. Accordingly, their request for injunctive relief on the grounds that they are improperly confined pretrial detainees is moot. The other two forms of relief they seek continue to be viable.

[2] The District Court had subject matter jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

II.

Stevenson, Manley, and Jones present two arguments as to why their complaint should have survived the motion to dismiss. First, they argue that they have sufficiently asserted a liberty interest in being free from punishment prior to imposition of sentence. Second, they assert that they should have been afforded notice of their transfer and an opportunity to respond. The Warden disputes the sufficiency of their substantive and procedural due process claims, arguing that they have made only conclusory allegations regarding punishment and have no cognizable liberty interest in being housed in the general prison population.

In support of his contention that the complaint made only conclusory statements regarding punishment, the Warden looks to *Evancho v. Fisher,* 423 F.3d 347, 351-53 (3d Cir.2005). The opinion in *Evancho,* however, offers the Warden no support. The holding of *Evancho* is that the amended complaint of a state employee filed against the state attorney general alleging violations of the Pennsylvania Whistleblower Law and her civil rights failed to meet the liberal pleading requirement of Federal Rule of Civil Procedure 8(a). Evancho admitted that she did not have evidence of the involvement of one of her named defendants. *Id.* at 350. The complaint here is significantly different in that it does support a claim for substantive due process violations. As the Warden acknowledges, the complaint alleges that "Plaintiffs weren't given an explanation for the punitive move."

This express reference to punishment is supported by numerous references in the complaint to lengthy stays in isolation with prisoners who had disciplinary problems or who were in protective custody, and the imposition of additional hardships that are not shared by the general prison population. The reasonable inference from these factual allegations is that appellants were impermissibly punished. *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir.1990) ("We accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them."). Liberal pleading dictates that, particularly in the context of a pro se complaint, such allegations be deemed sufficient. *Erickson v. Pardus*, ___ U.S. ___, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007); *Gibbs v. Roman*, 116 F.3d 83, 86 (3d Cir.1997).

To be sure, there are reasonable inferences apart from punishment that could be drawn from the complaint as explanation for the appellants' confinement. Jones notes that he was alleged to have been a participant in a riot at the Gander Hill detention facility. If this allegation is true, it is entirely possible that his relocation to the Smyrna facility's SHU was for disciplinary reasons rather than for impermissible retaliation or punishment. Likewise, Stevenson and Manley admit that they had been sentenced to death, but that only their sentences had been vacated. Death sentences are available in Delaware only for offenses of first-degree murder. *See* 11 DEL. CODE §§ 636, 4209(a). Accordingly, the Warden's assertion that Stevenson and Manley were housed in the SHU

because they were charged with violent offenses is also a legitimate inference to be drawn from the complaint. However, the fact that such inferences may be drawn is proof that the dismissal was premature. The appellants have met their obligation to provide grounds for their entitlement to relief by presenting factual allegations sufficient to raise their right to relief above a speculative level. *See, e.g., Bell Atlantic Corp. v. Twombly,* ___ U.S. ___, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007).

The complaint also alleges sufficient facts to make out a claim for relief based on procedural due process. In addition to the list of deprivations the plaintiffs suffered, the complaint states that they were not afforded "all the rights of normal pretrial [detainees]," and that the "standard practice at Delaware Correctional Center" of returning those whose sentences had been vacated to the general prison population was not followed. These allegations do not explicitly state the nature of the appellants' alleged liberty interest, but they provide an adequate framework for the inquiry. *See, e.g., Unger v. Nat'l Residents Matching Program,* 928 F.2d 1392, 1402 (3d Cir.1991) (requiring "facts in [the] complaint from which we could infer that [plaintiff] had a liberty or property interest").

The complaint details the differences between the conditions they encountered in the SHU and those encountered by regular pretrial detainees. It evinces the appellants' contention that they were improperly housed in the SHU without explanation

or an opportunity to contest their placement. The complaint states that the appellants wrote to Warden Carroll and his employees requesting an explanation for their confinement in the SHU, but received no response. The reasonable inference to be drawn from these allegations is that the appellants assert a liberty interest in being free from punishment while awaiting sentencing and in not being held in the SHU indefinitely. The plaintiffs specifically requested relief in the form of "a system to inform inmates why they were put into isolation, who made the decision to put them in isolation, and a chance to appeal the decision to a non-partisan official." They also requested that the prison "[m]ake procedural safeguards." The allegations in the complaint sufficiently raise the appellants' claim that their procedural due process rights were violated.

III.

A.

Although both Stevenson and Manley had been convicted at the time of their complaint, they are classified as pretrial detainees for purposes of our constitutional inquiry. *See Cobb v. Aytch,* 643 F.2d 946, 962 (3d Cir.1981) ("The right to remain at liberty continues until a court pronounces a judgment of sentence, although after a jury has pronounced a guilty verdict the court may insist upon greater assurance that a defendant will submit to sentence."); *see also Fuentes v. Wagner,* 206 F.3d 335, 341 (3d

Cir.2000). Their initial sentences had been vacated and they were awaiting resentencing at the time of their complaint and for the duration during which they allege they were subjected to due process violations. Jones was awaiting trial at the time of the complaint. The Warden does not contest the status of the appellants as pretrial detainees for purposes of this appeal.

B.

With respect to the substantive due process claims of punishment, in *Bell v. Wolfish,* the Supreme Court established the principle that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." 441 U.S. 520, 535-36, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). The *Bell* Court mandated a pragmatic approach to determining what constitutes punishment, and formulated the "reasonable relationship" test for determining whether a restriction is punitive. *Id.* at 539, 99 S.Ct. 1861 ("[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment.'"). To aid courts in applying this test, the *Bell* opinion looked to the test in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) for factors that courts might use as guideposts in distinguishing restrictions that are punitive from those that are not:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry. . . .

See also Bell, 441 U.S. at 537-38, 99 S.Ct. 1861. However, the Court cautioned that "[a]bsent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Id.* at 538, 99 S.Ct. 1861 (quoting *Kennedy,* 372 U.S. at 168-69, 83 S.Ct. 554). Thus, "if a restriction or condition is not reasonably related to a legitimate goal – if it is arbitrary or purposeless – a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees." *Id.* at 539, 83 S.Ct. 554.[3]

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[3] In a footnote, the Court exhorted that

> In determining whether restrictions or conditions are reasonably related to the Government's interest in

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Unconstitutional punishment typically includes both objective and subjective components. As the Supreme Court explained in *Wilson v. Seiter,* 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991), the objective component requires an inquiry into whether "the deprivation [was] sufficiently serious" and the subjective component asks whether "the officials act[ed] with a sufficiently culpable state of mind[.]" *Id.* at 298, 111 S.Ct. 2321. The Supreme Court did not abandon this bipartite analysis in *Bell,* but rather allowed for an inference of mens rea where the restriction is arbitrary or purposeless, or where the restriction is excessive, even if it would accomplish a legitimate governmental objective. *See Bell,* 441 U.S. at 538-39 & n. 20, 99 S.Ct. 1861.Thus, we agree with the summary of the holding of *Bell* in *Rapier v. Harris*:

> [A] particular measure amounts to punishment when there is a showing of express intent to punish on the part of detention facility officials, when the restriction or condition is not rationally related to a legitimate

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maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."

Id. at 540 n. 23, 83 S.Ct. 554 (citations omitted).

> non-punitive government purpose, or when the restriction is excessive in light of that purpose.

172 F.3d 999, 1005 (7th Cir.1999).

Because the District Court could not make either an objective inquiry into the severity of the deprivations or a subjective inquiry into the mental state of the officials at the motion to dismiss stage, the dismissal was improper. One reasonable inference from the allegations in the complaint of disparate treatment of prisoners is that, at a minimum, the appellants' confinement in the SHU was arbitrary. *See id.* at 304, 111 S.Ct. 2321 (allowing collective examination of conditions of confinement); *see also Bell,* 441 U.S. at 542, 99 S.Ct. 1861 (stating that confining pretrial detainees "in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment"). Stevenson and Manley assert that they were not treated in the same manner as other similarly situated inmates. Jones' allegations suggest that one of the other prisoners who was alleged to have been involved in the riot at Gander Hill was released from the SHU in July 2003, and two others were moved into the general prison population in August 2003. These allegations intimate a degree of as yet unexplained arbitrariness in the procedures regarding placement in the SHU.

In evaluating a pretrial detainee's claim of unconstitutional punishment, courts must examine the totality of the circumstances within the institution. In *Hubbard v. Taylor*, 399 F.3d 150 (3d Cir.2005), we explained that "[o]ur inquiry into whether given conditions constitute 'punishment' must therefore consider the totality of circumstances within an institution." *Hubbard*, 399 F.3d at 160. Appellants assert that, as compared to the conditions for the general prison population, housing in the SHU is significantly more restrictive. The complaint draws specific, item-by-item comparisons between the restrictions in the SHU and those in the general prison population. The allegations in the complaint raise an inference of impermissible punishment that precludes granting a motion to dismiss and may warrant further discovery.[4]

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[4] The able District Judge erroneously relied upon *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995) for the proposition that the institutional decision to place appellants in the SHU "is exactly the type of decision the Supreme Court noted when it held that federal courts should defer to prison officials with respect to managing the 'ordinary incidents of prison life.'" Appellants' pretrial detainee status necessitates a more nuanced approach. The focus in *Sandin* was on state-created liberty interests regarding "freedom from restraint which, while not exceeding *the sentence* in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484, 115 S.Ct. 2293 (emphasis added). The Court emphasized that its holding was driven by "the range of confinement to be normally expected for one serving an

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When warranted, such discovery need not be extensive. In situations such as this, where the allegations of punishment are coextensive with the allegations that form the basis for the procedural due process claim, it will generally be sufficient for the prison officials to submit affidavits to show that the classification was appropriate based on reasonable prison management concerns. While district courts have discretion to manage their cases, such affidavits alone will often be adequate to resolve the punishment inquiry. Although the substantive and procedural due process evaluations are distinct, a showing by the prison officials that a restrictive housing assignment is predicated on a legitimate managerial concern and is therefore not arbitrary or purposeless, will typically foreclose the substantive due process inquiry.

C.

Appellants assert that they were denied notice of their transfer and an opportunity to respond. The Supreme Court has repeatedly stated that "[t]he core of due process is the right to notice and a meaningful

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indeterminate term," *id.* at 487, 115 S.Ct. 2293, and the "expected perimeters of the sentence imposed by a court of law," *id.* at 485, 115 S.Ct. 2293. Several courts of appeals, including this one, subsequently concluded that "*Sandin* does not apply [to pretrial detainees]. *Sandin* concerned punishment of a sentenced prisoner, and therefore required a completely different analysis." *Fuentes*, 206 F.3d at 342 n. 9; *see also Benjamin*, 264 F.3d at 188.

opportunity to be heard." *LaChance v. Erickson,* 522 U.S. 262, 266, 118 S.Ct. 753, 139 L.Ed.2d 695 (1998). Appellants have sufficiently pled facts to show that they were housed in the restrictive conditions of the SHU without any procedural protections. Although pretrial detainees do not have a liberty interest in being confined in the general prison population, they do have a liberty interest in not being detained indefinitely in the SHU without explanation or review of their confinement. This result is compelled by our holding in *Shoats v. Horn,* 213 F.3d 140 (3d Cir.2000). In our discussion in *Shoats* focusing on the liberty interests at stake, we explained that "we have no difficulty concluding that eight years in administrative custody, with no prospect of immediate release in the near future, is 'atypical' in relation to the ordinary incidents of prison life." *Id.* at 144. Unlike appellants, Shoats was a sentenced inmate who received periodic review of his status, to which he was permitted to respond. *Id.* at 145-46. As explained above, the protections due to sentenced inmates provide a floor for what pretrial detainees may expect.

In determining what procedural protections are adequate, we are guided by the tenet that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands. Accordingly, resolution of the issue whether . . . administrative procedures provided . . . are constitutionally sufficient requires analysis of the governmental and private interests that are affected." *Mathews v. Eldridge,* 424

U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (citations omitted). Thus, the substantive liberty analysis is integral to the inquiry into the process due. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539, 560, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) ("Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." (citations omitted)); *Benjamin v. Fraser,* 264 F.3d 175, 190 (2d Cir.2001).

Taking into account both the private interests of the detainees and the governmental function involved, it becomes clear that the process required for administrative transfers of pretrial detainees need not be extensive. Detainees have a liberty interest in not being subjected to punishment for the crime with which they have been charged until after they have been convicted and sentenced, but the governmental interest in maintaining prison security for the duration of their detention is substantial. *Bell v. Wolfish,* 441 U.S. 520, 540, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) ("The Government also has legitimate interests that stem from its need to manage the facility in which the individual is detained.").

Prison officials must provide detainees who are transferred into more restrictive housing for administrative purposes only an explanation of the reason for their transfer as well as an opportunity to respond. This level of process comports with the Supreme

Court's holding in *Hewitt v. Helms,* 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983) that the removal of a sentenced inmate from the general prison population and his transfer into administrative segregation requires at least a minimal degree of process. The Court explained that "the Due Process Clause requires only an informal nonadversary review of evidence . . . in order to confine an inmate feared to be a threat to institutional security to administrative segregation." *Id.* at 474, 103 S.Ct. 864. This informal nonadversary review is satisfied when an inmate receives "some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation." *Id.* at 476, 103 S.Ct. 864. The Court further explained that "[t]he proceeding must occur within a reasonable time following an inmate's transfer. . . . " *Id.* at 476 n. 8, 103 S.Ct. 864.

The degree of process required varies depending on the reason for the transfer, with greater process accorded to prisoners who are confined for disciplinary infractions than those moved for purely administrative reasons. *See Mathews,* 424 U.S. at 334, 96 S.Ct. 893. In *Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), the Supreme Court held that "written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense," and "there must be a 'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary

action." *Id.* at 564, 94 S.Ct. 2963. As the Second Circuit has noted, "the procedures required by *Wolff* apply if the restraint on liberty is imposed for disciplinary reasons; if the restraint is for 'administrative' purposes, the minimal procedures outlined in *Hewitt* are all that is required." *Benjamin,* 264 F.3d at 190; *see also Rapier v. Harris,* 172 F.3d 999, 1005-06 (7th Cir.1999). Due to the unique exigencies of prison management, and in accordance with *Hewitt,* the minimal exchange of paperwork our holding will occasion need not occur prior to the transfer of a detainee.

Jones' complaint suggests that his transfer was occasioned by his alleged participation in a prison riot, which may necessitate a higher level of procedure. Stevenson and Manley allege only that they were transferred without explanation. The Warden stated in an affidavit attached to his memorandum in support of the motion to dismiss that Jones' transfer to the SHU was due to the fact that he had "very serious pending charges" and "a number of inmate disciplinary infractions." The Warden also stated that Stevenson and Manley were housed in the SHU based on their "potential . . . to again receive a sentence of death." Accordingly, the District Court should examine the asserted purposes for appellants' detentions, and determine whether sufficient process has been afforded.

In considering the asserted rationale for placing pretrial detainees in restricted housing, courts should be mindful of our pronouncement in *Shoats*: "Shoats

could conceivably be held in administrative custody merely because his prior crimes reasonably foreshadow future misconduct." *Shoats,* 213 F.3d at 146. This consideration is consistent with the Supreme Court's emphasis on the principle that "we are unwilling to substitute our judgment on these difficult and sensitive matters of institutional administration and security for that of 'the persons who are actually charged with and trained in the running' of such facilities." *Block v. Rutherford,* 468 U.S. 576, 588, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984) (quoting *Bell,* 441 U.S. at 562, 99 S.Ct. 1861).

In *Bell,* the Supreme Court instructed that if there is a reasonable relationship between the particular condition or restriction of pretrial detention and a legitimate governmental objective, then that condition, "without more," does not infringe upon a detainee's constitutional rights. *Bell,* 441 U.S. at 539, 99 S.Ct. 1861. In this case, at the motion to dismiss stage, it is not possible to discern whether the relationship between the appellants' detention in the SHU and a legitimate governmental objective is reasonable. Such a determination may be properly made on a motion for summary judgment, at which point the Warden must come forward and demonstrate the governmental objective in question.

IV.

Warden Carroll asserts that he is entitled to qualified immunity on the grounds that even if the

facts alleged show a violation of a constitutional right, that right was not clearly established. *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."). The District Court dismissed the complaint on the merits and therefore did not reach the issue of qualified immunity. It is not necessary for us to resolve this question now. We leave it to the District Court to consider qualified immunity on remand.

V.

Under the liberal construction of complaints afforded to pro se prisoner plaintiffs, we find that the complaint challenges the reasonable relationship of the appellants' confinement to a legitimate government objective and alleges impermissible punishment of pretrial detainees. The complaint alleges deprivations suffered by the appellants and compares their living conditions to those of the general prison population. The appellants asserted that they had sought, but been refused, an explanation for their placement in the SHU. Accordingly, the complaint alleges sufficient facts to survive the motion to dismiss. We will vacate the dismissal of the complaint and remand the case to the District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DAVID STEVENSON, MICHAEL MANLEY, and MICHAEL L. JONES,	)	
Plaintiffs,	)	Civil Action No. 04-139-KAJ
v.	)	
THOMAS CARROLL,	)	
Defendant.	)	

MEMORANDUM ORDER

(Filed Dec. 7, 2004)

I. INTRODUCTION

Presently before me is a Motion to Dismiss (Docket Item ["D.I."] 24) and a Motion for a Protective Order (D.I. 26) filed by Thomas Carroll ("Defendant"). Also before me is an Amended Motion for Order to Show Cause and a Temporary Restraining Order (D.I. 14) and a Motion to Compel Discovery (D.I. 31) filed by David Stevenson, Michael Manley, and Michael L. Jones (collectively "Plaintiffs"). Plaintiffs, who are inmates at the Delaware Correctional Center (the "DCC"), brought this action under 42 U.S.C. § 1983 alleging violations of their rights under the Eighth and Fourteenth Amendments to the United States Constitution. (D.I. 1-4.) Jurisdiction is proper under 28 U.S.C. § 1331. For the reasons that follow, Defendant's Motions to Dismiss will be granted and the remaining Motions will be dismissed as moot.

II. BACKGROUND

The Plaintiffs had been sentenced to death by the Superior Court of Delaware. (D.I. 4, Ex. 1 at 3.) On or about May 30, 2001, however, the sentences were vacated and the case was remanded to the Superior Court for review of the sentences. Plaintiffs were then moved from the death-row tier of the DCC to a more secure section for pre-trial detainees.[1] (*Id.*) At the time of the filing of the Complaint, Plaintiffs had been housed in the more restrictive section for 32 months. (*Id.* at 4.) Plaintiffs assert that they have never been given an explanation as to why they have been placed in their more restrictive housing within the prison. (*Id.*) Plaintiffs wrote to Defendant, the Warden of the prison, to complain about their assignment to the restrictive section of pre-trial housing but they did not receive a reply. (*Id.* at 2.)

---

[1] There appears to be a disagreement between Defendant and Plaintiffs over whether the area in which Plaintiffs were housed is considered isolation. (*See* D.I. 25, Ex. A at 1.) Additionally, Plaintiffs list a number of rules and restrictions that are enforced in their housing area to highlight the differences between their housing section and the normal pre-trial housing section. (D.I. 4, Ex. 1 at 3.) As Plaintiffs do not allege that the prison conditions alone are a violation of their constitutional rights, but rather allege that the decision to house them there is a such a violation, an exact understanding of their present housing situation is not required.

III. STANDARD OF REVIEW

In deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the factual allegations in the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (*per curiam*). This is especially true where, as here, the complaint is filed *pro se*. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (citations omitted). A *pro se* complaint can only be dismissed for failure to state a claim if it appears "beyond doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). However, broad, unsupported allegations do not preclude dismissal and do not constitute a cause of action. *Signore v. City of McKeesport*, 680 F. Supp. 200, 203 (W.D. Pa. 1988), *aff'd*, 877 F.2d 54 (3d Cir. 1989).

IV. DISCUSSION

Plaintiffs argue that their assignment to the more restrictive section of pre-trial housing, without explanation, is a violation of their constitutional rights under 42 U.S.C. § 1983. (D.I. 4.) The Supreme Court has held, however, that "[i]t is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence." *Hewitt v. Helms*, 459 U.S. 460, 468 (1983). The Court has further stated "that federal courts ought to afford appropriate

deference and flexibility to state officials trying to manage a volatile environment. . . . Such flexibility is especially warranted in the fine-tuning of the ordinary incidents of prison life, a common subject of prisoner claims." *Sandin v. Conner*, 515 U.S. 472, 482-483 (1995). More specifically, this court has held that the transfer of an inmate from general population to "administrative segregation without being given notice and an opportunity to argue against the transfer" is not a violation of the inmates constitutional rights. *Brown v. Cunningham*, 730 F. Supp. 612, 614 (D. Del. 1990).

Looking at the case law, it is evident that Plaintiffs have failed to state a claim upon which relief can be granted. The prison's decision to place Plaintiffs in a more secure housing section is exactly the type of decision the Supreme Court noted when it held that federal courts should defer to prison officials with respect to managing the "ordinary incidents of prison life. *Sandin*, 515 U.S. at 482-483. Therefore, even assuming all the facts pleaded in the Plaintiffs' Complaint are true, they have failed to state a claim upon which relief can be granted. Consequently, Defendant's Motion to Dismiss will be granted and all other motions will be dismissed as moot.

V. CONCLUSION

Accordingly, it is hereby ORDERED that Defendants' Motion to Dismiss (D.I. 24) is GRANTED, and Defendant's Motion for a Protective Order (D.I. 26),

Plaintiffs' Amended Motion for Order to Show Cause and Temporary Restraining Order (D.I. 14) and Motion to Compel Discovery (D.I. 31) are all dismissed as moot.

/s/ Kent A. Jordan
UNITED STATES DISTRICT JUDGE

December 7, 2004
Wilmington, Delaware

ORIGINAL

FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. §1983

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

David Stevenson, Michael Manley, Michael L. Jones
(Enter above the full name of the plaintiff in this action)

V.

Thomas Carroll, Warden of Delaware Correctional Center

(Enter above the full name of the defendant(s) in this action)

I. Previous lawsuits

A. Have you begun other lawsuits in state or federal courts dealing with the same facts involved in this action or otherwise relating to your imprisonment?
YES [X] NO [ ]

B. If your answer to A is yes, describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline).

1. Parties to this previous lawsuit

Plaintiffs (see attached.)

Defendants (see attached.)

2. Court (if federal court, name the district; if state court, name the county) (see attached)

3. Docket number (see attached)

4. Name of judge to whom case was assigned (see attached)

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?)
(see attached)

6. Approximate date of filing lawsuit
(see attached)

7. Approximate date of disposition
(see attached)

II. A. Is there a prisoner grievance procedure in this institution? YES [X] NO [ ]

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure? YES [X] NO [ ]

C. If your answer is YES,

1. What steps did you take?
(see attached)

2. What was the result? (see attached)

D. If your answer is NO, explain why not
N/A

E. If there is no prison grievance procedure in the institution, did you complain to prison authorities? YES [X] NO [ ]

F. If your answer is YES,

1. What steps did you take? (see attached)

2. What was the result? (see attached)

III. Parties

(In item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of Plaintiff David Stevenson #317036, Michael Manley #338485, Michael L. Jones #417267

Address Delaware Correctional Center, 1181 Paddock Road, Smyrna, DE 19977

(In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and place of employment of any additional defendants.)

B. Defendant Thomas Carroll is employed as warden at Delaware Correctional Center 1181 Paddock Road, Smyrna, DE 19977

C. Additional Defendants_____

_____

_____

_____

IV. Statement of Claim

(State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.)

(see attached)_____

_____

_____

_____

_____

V. Relief

(State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.)

(see attached)_____

_____

_____

_____

_____

Signed this ___ day of _____, 20__

_____

(Signature of Plaintiff)

I declare under penalty of perjury that the foregoing is true and correct.

_____ _____

Date (Signature of Plaintiff)

I. Previous Lawsuits

B. 1. *Parties to this previous lawsuit*

Plaintiff: David Stevenson #317036

Defendant: Thomas Carroll, warden of Delaware Correctional Center (DCC), Joe Hudson, Support Services Manager at D.C.C.

2. *Court*: United States District Court, District of Delaware.

3. *Docket number*: CA 00-732 KAJ

4. *Name of judge to whom case was assigned*: Judge Kent A. Jordan

5. *Disposition*: still pending

6. *Approximate date of filing lawsuit*: August 9, 2000

7. *Approximate date of disposition*: still pending

II. C.

1. *What steps did you take*? I filed a grievance July 6, 2003 to get an explanation as to why I'm in isolation. I only filed a grievance to see if I was going to get

some kind of response from the administration.

2. *What was the result*? I was told, "Inmates do not have the choice of where they are housed" and "submit a request to see your counselor and discuss it with him/her."

F.

1. *What steps did you take*? The grievance procedure at D.C.C. does not handle housing issues. I wrote letters to: Warden Thomas Carroll, Deputy Warden Lawrence McGuigan, Captain Joseph Belanger and Captain Clyde Sagers, and Counselor Marissa McFadden. I asked each person, why was I in isolation, when am I getting out?

2. *What was the result*? I never received a response from Warden Thomas Carroll or Deputy Warden Lawrence McGuigan. I received verbal responses from Captains Joseph Belanger and Clyde Sagers. Both said they did not know why I'm here in isolation and when I would be allowed out. I received a written response from Counselor Marissa McFadden that said she didn't have any classification papers on me and that I'm in isolation because I'm unsentenced. I received a verbal response from her that she does not know why I'm being kept in isolation.

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

Plaintiff – Michael L. Jones

Defendant Thomas Carroll

I. Previous lawsuits

1. Parties to this previous lawsuit
Plaintiffs – Michael L. Jones
Defendants – Thomas Carroll

2. Court United States District Court

3. Docket number 03-1139-GMS

4. Name of Judge to whom case was assigned – Judge Gregory M. Sleet

5. Disposition – still pending

6. Approximate date of filing lawsuit – December 2, 2003

7. Approximate date of disposition – still pending

II.

1. What steps did you take? N/A

2. What was the result? N/A

D. if your answer is NO, explain why not – A disiplinary action is not grievable.

1. What steps did you take? I wrote the Warden Thomas Carroll, deputy Warden Lawrence McGuigan, Captain Belinger, Captain Sagers, and SHU Counsler Marissa McFadden.

2. What was the result? There were none, SHU counsler Marissa McFadden said she has no idea why.

III.

A. Name of Plaintiff – Michael L. Jones

Address – Delaware Correctional Center 1181 Paddock Rd. Smyrna Del 19977

B. Defendant – Thomas Carroll is employed as The Warden at Delaware Correctional Center Smyrna Delaware

IV. Statement of Claim

The plaintiff Michael L. Jones was moved from ganger hill prision in Wilmington Delaware on feb. 19, 2003 along with several other inmates for an alledge riot to Smyrna DCC SHU. Plaintiff never recieved a hearing nor was he able to defendant himself against the said accusations. In July of 2003 one of the alledge partakers (Robert Garvey) was moved back to gander hill prison regular population, in August the rest of the alledge partakers (Russell Grimes and Jose Pena) were moved to B-Building pre-trial at DCC except for plaintiff. Plaintiff remains in the SHU at DCC which is for inmates which have disciplinary problems or protected custody. Since feb. 20, 2003 plaintiff has wrote the Warden Thomas Carroll, deputy Warden Lawrence McGuigan, Captain Belinger, Captain Sagers and SHU Counsler Marissa McFadden trying to get an explanation as to why he is in the SHU. None of plaintiffs letters were responded to. Plaintiff has never had a hearing with staff as to why he had

to remain in the SHU. The Warden Thomas Carroll is to be held accountable for all actions.

Signed this 25 day of febuary 2004

/s/ Michael L. Jones

I declare under penalty of perjury that the foregoing is true and correct.

February 25, 2004 /s/ Brian D. Engrem
Notary
2-25-04

IV. *Statement of Claim*

1. Plaintiffs David Stevenson and Michael Manley are incarcerated at Delaware Correctional Center.

2. Defendant Thomas Carroll is employed by the State of Delaware at Delaware Correctional Center.

3. Defendant Thomas Carroll is the Warden in charge of all operations at Delaware Correctional Center. He is sued in his individual and official capacities.

4. Defendant has acted and continues to act under color of State Law at all times relevant to this complaint.

5. The Plaintiffs were sentenced to Death by the Superior Court of Delaware on or about January 10, 1997.

6. Through the appeals process in State courts, the Plaintiffs sentence was vacated and convictions remanded for review by a new Superior Court Judge on or about May 30, 2001.

7. As was standard practice at Delaware Correctional Center the Plaintiffs were returned to pre-trial detainee status and moved off of the Death Row tier.

8. Instead of being moved to pre-trial, as other inmates were in the same situation, plaintiffs were moved to an isolation tier for pre-trial inmates.

9. The pre-trial isolation tier was established for inmates who had discipline problems in normal pre-trial, protective custody, and for observation of new inmates and transfers.

10. Plaintiffs weren't given an explanation for the punitive move.

11. Plaintiffs wrote Defendant Thomas Carroll and his subordinates and weren't given any explanations.

12. The Rules in isolation are as follows:

    a) Recreation for about an hour three days out of a week. Which means out of cell three hours a week. (45 minutes recreation and 15 minutes shower.)

    b) Inmates are handcuffed to and from the steel cage recreation area and to and from the shower.

c) One 45-minute visit a week. Inmates are handcuffed and shackled at visits. Non-contact in a protective booth.

d) One 10-minute phone call a week.

e) Law Library is via mail and there is at least a twenty four hour wait on all information.

f) Legal calls are at least a twenty four hour wait.

g) No religious services.

h) There isn't a light switch in cells. Officers control the lights. Furthermore, there isn't any individual cell light switches. Either all the cell lights are on or off.

i) Pre-trial isolation and the sanction tier are the only housing areas where televisions are banned.

j) Commissary is every two weeks. Inmates can spend fifteen dollars each time. Included in the fifteen dollars are stamps, paper, envelopes, hygiene products, and food. No allowances are made even though the institution stopped mailing three free letters a week for inmates. All items aren't available to isolation inmates.

k) There aren't any exercise opportunities in the recreation yard inside or outside.

l) Inmates can't possess any art supplies, playing cards, etc., or any mind stimulation activities.

13. The Rules for every Pre-trial inmate not in isolation:

a) Recreation every day. Inmates are only locked in cells for institutional counts and night lock-in.

b) Inmates are only handcuffed when going to court.

c) Two-45 minute, or one-90 minute visit a week. contact.

d) Two-10 minute phone calls a week.

e) Law Library is available everyday. Inmates do research on their own at the Library.

f) Legal Calls available upon request.

g) Religious services via television.

h) Light switches in cells.

i) Commissary is every week. Inmates can spend forty dollars a week. All items are available.

j) Recreation equipment is available.

k) Inmates can have art supplies, playing cards and board games to stimulate the mind.

14. Since the Plaintiffs have been in isolation (approximately 32 months to date) they have not had a hearing about their stay in isolation, have not received any reason via paperwork as to why they're in isolation, have not had an opportunity to confront the decision maker, orally or in writing.

15. There also aren't any rules, in writing, from the institution informing inmates how to leave isolation.

16. Plaintiff David Stevenson was moved to normal pre-trial for a month from December 2003 to January 2004. He was moved mysteriously there and moved mysteriously back, still without an explanation.

17. At the time of this complaint Plaintiffs David Stevenson and Michael Manley are still in isolation and still haven't received a reason or cause from Defendant Thomas Carroll.

V. *Relief*

1. Plaintiffs want to be moved out of isolation and to normal pre-trial until the conclusion of their criminal cases and they are either sentenced or released.

2. Plaintiffs want to be awarded monetary damages of at least $100,000 a month, for each Plaintiff, for every month the Court deems the Plaintiffs were illegally kept in isolation, for mental abuse and intentional distress, and for deliberate indifference by Defendant Thomas Carroll.

3. Establish a system to inform inmates why they were put into isolation, who made the decision to put them in isolation, and a chance to appeal the decision to a non-partisan official.

4. Establish rules for how long any pre-trial inmate can be put into isolation.

5. Establish a system that inmates kept in isolation because of lack of space in normal pre-trial get all the rights of normal pre-trial until they can be moved.

6. Make procedural safeguards.

7. Any other relief the Court deems necessary.

B. Issue and Injunction ordering Defendant Thomas Carroll:

    1. To immediately give Plaintiffs normal pre-trial privileges as set forth in this complaint including personal televisions, complete commissary item access, and recreation time.

    2. Move Plaintiffs to normal pre-trial when space is available.

    3. To refrain from retaliatory practices by his staff.

    4. To immediately start process of moving all pre-trial inmates out of isolation who have been housed there more than 30 days.

5. Immediately establish a 30 day cut off for pre-trial inmates yearly stay at any one time in isolation.

Signed this 25 day of February, 2004

/s/ David Stevenson
/s/ Michael R. Manley
/s/ Michael L. Jones

I declare under penalty of perjury that the foregoing is true and correct.

2-25-04
(Date)

/s/ David Stevenson
/s/ Michael Manley
/s/ Michael L. Jones

/s/ Brian D. Engrem
Notary
2-25-04

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DAVID STEVENSON, MICHAEL MANLEY, and MICHAEL JONES	)	
Plaintiffs,	)	C.A. No.04-139-KAJ
v.	)	Jury Trial Demanded
THOMAS CARROLL	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION TO DISMISS

(Filed Jul. 9, 2004)

1. David Stevenson, Michael Manley and Michael Jones ("plaintiffs") are detainees incarcerated and under the supervision of the Delaware Department of Correction ("DOC") within the Delaware Correctional Center ("DCC") Smyrna, Delaware.

2. On or about March 4, 2004, the plaintiffs filed a complaint with leave to proceed *in forma pauperis* pursuant to 42 U.S.C. §1983, alleging Eighth and Fourteenth Amendment Due Process violations. (D.I.##1-4). Specifically, the plaintiffs allege that subsequent to their death sentences being overturned in May, 2001, the plaintiffs were transferred from death row to "an isolation tier for pretrial inmates" in DCC's SHU's pre-trial unit. (Complaint, *passim*). The plaintiffs claim that they should

have been moved to the less restrictive B building pre-trial unit rather than SHU's pre-trial isolation which houses inmates who have "disciplinary problems." *Id.* For relief, the plaintiffs request monetary damages as well as injunctive relief. *Id.*

3. In deciding a motion to dismiss under Fed. R.Civ. P. 12 (b)(6), the Court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. *See Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc.*, 140 F.3d 478, 483 (3d Cir.1998). A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiffs favor, no relief could be granted under any set of facts consistent with the allegations of the complaint. *Id.* Claims may be dismissed pursuant to Rule 12(b)(6) motion only if the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Where the plaintiffs are *pro se* litigants, the court has an obligation to construe the complaint liberally. *Haines v. Kerner,* 404 U.S. 519, 520 (1972). Additionally, a claim under 42 U.S.C. §1983 "must allege conduct which deprives the victim of a right or privilege secured by the Constitution or laws of the United States." *Freedman v. City of Allentown,* 853 F.2d 1111, 1114 (3d Cir.1988) (citations omitted).

4. Plaintiffs allege their Fourteenth Amendment due process rights were violated when they

were moved "without any explanation" to SHU's pre-trial unit after their death sentences were overturned. (Complaint, passim). Analysis of plaintiffs' due process claims begins with determining whether a constitutionally protected liberty interest exists. *Sandin v. Connor,* 515 U.S.472 (1995); *Hewitt v. Helms,* 459 U.S.460 (1983). "Liberty interests protected by the Fourteenth Amendment may arise from two sources – the Due Process Clause itself and the laws of the States. *Hewitt,* 459 U.S. at 466. The Supreme Court has explained that liberty interests protected by the Due Process Clause are limited to "freedom from restraint" which imposes an atypical and significant hardship in relation to the ordinary incidents of prison life." *Sandin,* 515 U.S. at 483-84. Reclassification to a stricter housing unit and its consequent loss of privileges "falls within the expected parameters of the sentence imposed by a court of law." Id. at 485. Moreover, the Delaware District Court has determined that the Department of Correction statutes and regulations do not provide prisoners with liberty or property interests protected by the Due Process Clause. *Carrigan v. State of Delaware,* 957 F.Supp.1376 (D.Del.1997). (Inmates may be administratively transferred pending classification or reclassified to more restrictive security levels for violations of the Rules of Conduct. DOC Rules of Conduct, Number 4.2) DOC Procedure 3.31 explicitly states that the warden has virtually unlimited discretion in placing inmates within the prison in "any security/custody level." *See, i.e, Brown v. Cunningham,* 730 F.Supp.612, 614 (D.Del.1990) (stating that

plaintiffs transfer from general population to administrative segregation, without being given notice and opportunity to challenge it, was not violation of plaintiffs liberty interest). Neither Delaware law nor DCC regulations create a liberty interest in a prisoner's classification within an institution. 11 *Del.C.* §6529(e). Defendants assert plaintiffs' transfer from the death row tier to SHU's pre-trial unit was within the normal limits or range of custody [their] convictions authorizes the State to impose. *Meachum v. Fano,* 427 U.S. 215, 225 (1976).

Contrary to plaintiffs' allegations, they are not housed in isolation. (See affidavit of Thomas Carroll attached hereto Exh.A-1). Admittedly, SHU pre-trial is more restrictive than B building pre-trial; however, the plaintiffs are not in isolation; nor are they denied access to their attorneys, the law library, commissary, recreation or the grievance procedure. (A-2). The plaintiffs are housed in SHU pre-trial based on the security needs of the institution and the determination that the plaintiffs present a significant security risk if housed in the B building pre-trial unit. (A-1). Once re-sentenced, the plaintiffs will be classified to a security level pursuant to DOC guidelines and procedures. (A-2). Accordingly, since plaintiffs' transfer to another unit within the DCC does not "impose an atypical and significant hardship in relation to the ordinary incidents of prison life," their complaint should be dismissed pursuant to Fed.R.Civ.P.12(b)(6) for failure to state a claim upon which relief may be granted.

5. Plaintiffs also allege that defendant Carroll has demonstrated deliberate indifference regarding their conditions of confinement in violation of their Eighth Amendment right to be free from cruel and unusual punishment. (Complaint, *passim*). The Supreme Court has held that conditions of confinement amount to cruel and unusual punishment only where they "involve the wanton and unnecessary infliction of pain" or are "grossly disproportionate to the severity of the crime warranting imprisonment" or deprive inmates of the minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

> [Conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.

Id at 347. While inmates retain some constitutional rights while incarcerated, by virtue of their conduct and resultant sentence, they must live in a restrictive environment. *Wilson v. Seiter,* 501 U.S. 294, 304 (1991). Under *Wilson,* in order to establish an Eighth Amendment constitutional violation based on the conditions of their confinement, plaintiffs must prove both an objective element – that the deprivation was sufficiently serious, and a subjective element that a prison official acted with a sufficiently culpable state of mind." *Id* at 297. The minimal requisite state of

mind for an Eighth Amendment violation is deliberate indifference. *Id.* The Court further stated that a constitutional violation will be found only when the conditions of confinement "have a mutually enforcing effect that produces the deprivation of a single identifiable human need such as food, warmth, or exercise," and that "[n]othing so amorphous as 'overall conditions' can rise to the level of [such a violation] when no specific deprivation of a single human need exists. *Id.* at 303-04.

6. Defendant addresses plaintiffs' various allegations below and conclude that plaintiffs fail to identify a constitutionally protected right enforceable under 42 U.S.C. § 1983. In brief, the plaintiffs list general complaints regarding the MSU's pre-trial unit's overall conditions, but fail to identify a time or date when they were deprived of a "single identifiable human need." *Wilson,* 501 U.S. at 304. Moreover, plaintiffs fail to allege defendant's personal involvement in any identified conduct. The plaintiffs claim that conditions in SHU's pre-trial unit only allow them one hour of recreation three days a week, one forty-five minute visitor meeting a week, one ten minute phone call a week, a 24 hour wait for law library information, commissary every other week and no vegetarian meals. (Complaint, *passim*). Plaintiffs further contend that other inmates who are moved from death row to pre-trial are moved to B building pre-trial, a less restrictive unit. While this statement may be true, it is also true that DCC personnel considered the plaintiffs security risks

which resulted in their being housed in SHU pre-trial. Admittedly, plaintiffs' movements and activities are more restricted in SHU's pre-trial unit; however, plaintiffs still enjoy many of the privileges and activities that are permitted in other areas of the facility. "Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." *Wilson,* 501 U.S. at 305; *see also, Hoover v. Watson,* 886 F.Supp 410, 416-417 (D.Del. 1995), *aff'd* 74 F.3d 1226 (3d Cir. 1995). Plaintiffs have failed to demonstrate the constitutional deprivation they suffered or how defendant Carroll acted with a sufficiently culpable state of mind. Plaintiffs' allegations do not demonstrate wanton and unnecessary infliction of pain nor deliberate indifference on the part of defendant as to the state of their confinement. Despite less than perfect conditions at SHU's pre-trial unit plaintiffs have not been deprived of an identifiable human need. Plaintiffs' unsubstantiated allegations amount to nothing more than bald complaints concerning the overall conditions in MSU pre-trial. The presence of such burdens fails to establish a claim deemed justiciable by this Court making dismissal appropriate pursuant to Fed. R. Civ. P. 12(b)(6).

7. Assuming that the plaintiff may be attempting to hold the defendant liable based upon his supervisory position, it is well established that liability under 42 U.S.C.§1983 may not be predicated upon a theory of *respondeat superior. Rizzo v. Goode,* 423 U.S. 362 (1976); *Gay v. Petsock,* 917 F.2d 768 (3d Cir.

1990); *Heine v. Receiving Area Personnel,* 711 F.Supp. 178 (D.Del. 1989). To hold defendant liable, plaintiffs must: 1) identify with particularity what the defendant failed to do that demonstrates deliberate indifference: and 2) demonstrate a close causal relationship between the identified deficiency and plaintiffs' ultimate injury. *Sample v. Diecks,* 885 F. 2d 1099, 1118 (3d Cir. 1989); *City of Canton v. Harris,* 489 U.S. 378 (1989). Plaintiffs in this action have failed to show that the defendant exhibited deliberate indifference, or any other such acts which were related to any alleged injury which the plaintiffs claim they suffered. Accordingly, it is not surprising that plaintiffs fail to demonstrate any affirmative role on the part of the defendant that is in any way related to a Constitutional deprivation.

8. Moreover, plaintiff cannot maintain an action against the State defendant in his individual capacity. The plaintiff's complaint should be dismissed under the doctrine of qualified immunity. Government officials performing discretionary functions are immune from liability for damages, provided that their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). A right is "clearly established" when "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987).

9. Additionally, a violation of the Eighth Amendment cannot be predicated on mere negligence; it requires a finding of a culpable mental state on the part of prison officials. *Moore v. Tartler*, 986 F.2d 682 (3d Cir. 1993); *Haygood v. Younger*, 769 F. 2d 1350 (9th Cir. 1985). Therefore, to the extent plaintiffs allege that the defendant acted negligently (thereby violating their constitutional rights), such a claim is not cognizable under 1983. *See Chinchello v. Fenton*, 805 F.2d 126, 133 (3d Cir. 1986) (holding that to be legally responsible, the officials' misconduct cannot be merely a failure to act); *Commonwealth of Pennsylvania v. Porter* 659 F.2d 306, 336 (3d Cir. 1981), *cert. denied* 458 U.S. 1121 (1982). In this particular case, at worse, the defendant's actions can only be described as negligent. Mere negligence, however, does not satisfy the "deliberate indifference" standard *Wilson*, 501 U.S. at 298.

To the extent plaintiff seeks damages from the defendant in his official capacity the doctrine of sovereign immunity bars the claim. *See, Pagano v. Hadley*, 525 F. Supp. 92 (D.Del. 1982). Sovereign immunity provides that the State and its agencies may not be sued without its consent. *Doe v. Cates*, Del. Supr., 499 A.2d 1175 (1985), Del.Const.Art.I Sec.9. The only way to waive the State's sovereign immunity is by an act of the General Assembly. *Id.* at 1176. While it is true that the General Assembly has waived the defense of sovereign immunity as to any risk of loss covered by the State Insurance Coverage Program, 18 Del.C. §6511, there is no insurance in

any form applicable to the facts alleged in the present complaint. Consequently, sovereign immunity has not been waived in the present action, and plaintiff's suit against the defendant in his official capacity is barred.

11. Under 42 U.S.C §1983, an individual cannot be held liable in the absence of personal involvement or knowing acquiescence in the alleged deprivation. *Bracey v. Grenoble*, 494 F.2d 566 (3d Cir. 1974); *Commonwealth of Pennsylvania v. Porter*, 659 F.2d 306 (3d Cir. 1981), *cert. denied* 458 U.S. 1121 (1982). The plaintiffs fail to identify how the defendant participated in or was cognizant of the events which he claims deprived him of his constitutional rights. The plaintiffs' complaint is completely devoid of any allegations against the defendant or, for that matter, against any employee of the Department of Correction.

12. The defendant cannot be sued in his official capacity under 42 U.S.C. §1983. The Eleventh Amendment provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State." While the Amendment does not facially bar suits against the State by its citizens, the United States Supreme Court has held that in the absence of consent, a state is "immune from suits brought in federal courts by her own citizens as well as by

citizens of another State." *Edelman v. Jordan,* 415 U.S. 651, 662-63 (1974).

The Eleventh Amendment stands "for the constitutional principle that State sovereign immunity limit[s] the federal courts' jurisdiction under Article III." *Seminole Tribe of Florida v. Florida,* 517 U.S 44 (1996). The United States Congress can waive the state's sovereign immunity, and therefore, its Eleventh Amendment immunity through the Fourteenth Amendment; however, only a clear indication of Congress' intent to waive the states' immunity will produce this result. *Id.* No such clear intent can be seen in 42 U.S.C. §1983. In fact, Congress' intent appears to be to the contrary as the statute facially allows suits only to be brought against "persons." 42 U.S.C. §1983.

A suit against a state official in his official capacity is treated as a suit against the State. *Hafer v. Melo,* 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991). Under federal law, the defendant in his official capacity is not a "person" for the purposes of 42 U.S.C. § 1983. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71 (1989). Consequently, given this categorization, this Court lacks jurisdiction over the defendant in his official capacity, and defendant is outside the class of persons subject to liability under 42 U.S.C. §1983. Therefore, dismissal is appropriate.

13. To the extent plaintiffs may be deemed to be asserting a pendent State claim, the State Tort Claims Act shields defendant from personal liability

for acts done in good faith, without gross or wanton negligence, and arising out of and in connection with, the performance of official discretionary duties. 10 *Del C.* §4001(3); see, *Smith v New Castle County Vo-Tech,* 574 F. Supp. 813, 820 (D.Del. 1983). The defendant is entitled to good faith immunity under 10 *Del C.* §4001. In order for the defendant to be held liable, plaintiffs must establish that his acts either were not in connection with the performance of any official duty . . . not done in good faith . . . or constituted gross or wanton negligence. Plaintiffs have been unable to meet these criteria and therefore, dismissal is now appropriate.

14. As amended 28 U.S.C. § 1915(e)(2)(B)(ii) mandates dismissal of *in forma pauperis* actions determined to be frivolous by the Court. All of the legal claims raised by plaintiffs are *stare decisis* by the well-developed manifest case law decisions of this Court, the Third Circuit Court of Appeals, the United States Supreme Court, and the courts of the State of Delaware. There being no arguable legal basis for plaintiffs' claims, 28 U.S.C. § 1915(e)(2)(B)(ii) mandates dismissal of plaintiffs' complaint.

WHEREFORE, for all the foregoing reasons, the defendant respectfully requests this Honorable Court enter an Order granting the defendant's Motion to Dismiss.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Richard Hubbard
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Dated: July 9th, 2004

Attorney for Defendant
Thomas Carroll

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

DAVID STEVENSON, MICHAEL MANLEY, and MICHAEL L. JONES,	)	
Plaintiffs,	)	C.A. No. 04-139-KAJ
v.	)	Jury Trial Demanded
THOMAS CARROLL,	)	
Defendant.	)	

AFFIDAVIT OF THOMAS CARROLL

1. I am employed by the State of Delaware Department of Correction ("DOC") as the Warden at

the Delaware Correctional Center ("DCC"). I have been employed by the DOC since April 1,1980, and in my present capacity since October 1, 2001. My duties include responsibility for the management and operation of the DCC.

2. I have read the Plaintiffs' Complaint and dispute the allegations therein.

3. Plaintiffs' Stevenson and Manley were sentenced to death in January, 1997; however, their sentences for conviction of Murder 1st Degree were subsequently overturned in May, 2001. Presently, the plaintiffs are awaiting a new penalty hearing. Plaintiff Jones also has pending charges including Attempted Murder and Murder 1st Degree. Specifically, the plaintiffs are housed in SHU Building #18, D tier, they are not housed in isolation as they allege in their Complaint. An individual is considered for housing in the SHU pre-trial housing area based on the security needs of the institution and the determination that the individual presents a significant security risk if housed in the B Building pre-trial unit. The plaintiffs are viewed as security risks if housed in B Building pre-trial unit. Based on the potential for plaintiffs' Stevenson and Manley to again receive a sentence of death, it was determined that they presented a significant risk if housed in the B Building pre-trial unit. Based on this determination, plaintiffs' Stevenson and Manley were assigned to the SHU pre-trial housing area. In addition to very serious pending charges, plaintiff Jones has had a number of inmate disciplinary rule infractions that resulted in the

determination that he was inappropriate for placement in the B Building pre-trial unit. Based on this determination and the prevailing security needs of the institution, plaintiff Jones was placed on the SHU pre-trial housing area.

4. Although SHU's pre-trial is more restrictive than B Building pre-trial, inmates are not denied access to their attorneys, the law library, commissary, recreation or the grievance procedure as alleged by the plaintiffs. One sentenced, the plaintiffs will be classified to a security level pursuant to Department of Correction guidelines and procedures.

/s/ Thomas Carroll
Thomas Carroll

SWORN AND SUBSCRIBED before me this 1st day of July, 2004.

/s/ Michael Little
Notary

CERTIFICATE OF MAILING AND/OR DELIVERY

The undersigned certifies that on July 9th, 2004, he caused the attached *Defendant's Memorandum of Points and Authorities in Support of His Motion to Dismiss* to be delivered to the following persons in the form and manner indicated:

NAME AND ADDRESS OF RECIPIENT(S):

David Stevenson, Inmate
SBI #00317036
Michael Manley, Inmate
SBI #00338485
Michael L. Jones, Inmate
SBI #00417267
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Smyrna, DE 19977

MANNER OF DELIVERY:

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✓ Two true copies by first class mail, postage prepaid, to each recipient

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/s/ Richard Hubbard
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(3)

No. 07-575

IN THE

Supreme Court of the United States

THOMAS CARROLL, WARDEN,

Petitioner,

v.

DAVID STEVENSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Respondents, as pretrial detainees, alleged a valid substantive due process claim to be free of punishment sufficient to survive a motion to dismiss.

2. Whether Respondents, as pretrial detainees, alleged a valid procedural due process claim based on the constitutional right to be free from punishment and to avoid indefinite confinement in the highly restrictive and allegedly punitive Security Housing Unit ("SHU") sufficient to survive a motion to dismiss.

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INTRODUCTION

This case involves the application of the Rule 12(b)(6) motion to dismiss standard to a *pro se* complaint. Respondents allege in their Complaint that the State punished them and subjected them to highly restrictive conditions of confinement—in the case of two of the Respondents for almost five years—without any procedural process. The State concedes that Respondents were pretrial detainees and that the Constitution prohibits the State from punishing them. The State also does not dispute that if Respondents' constitutionally protected interests are at risk then some legal process is necessary. The only issues raised by the Petition are whether Respondents' substantive and procedural due process allegations are sufficient to meet the liberal pleading standard. These case-specific questions do not warrant review by this Court.

Indeed, the Third Circuit rightfully concluded that the particular allegations in the Complaint are sufficient to survive a motion to dismiss. Respondents allege, *inter alia*, that they were held in punitive conditions and were allowed out of their cell for only three hours a week. Respondents contend that similarly situated pretrial detainees were not being held in such restrictive confinement. Respondents also contend that they repeatedly asked the State to inform them of the reason for the punitive measures, but that those requests were ignored. Based on these alleged facts, the court of appeals concluded that the allegations raise an inference of "arbitrariness" that warrants further proceedings. The court also concluded that, given the allegations of extremely restrictive confinement, the

State likely should have provided some minimal, non-adversarial process to ensure that such conditions are not mistakenly or arbitrarily imposed.

The Third Circuit's decision is based on this Court's precedent and is consistent with that of the other circuits. This Court, almost thirty years ago, held that the Constitution prohibits imposing conditions or restrictions on pretrial detainees that are punitive or arbitrary. *Bell v. Wolfish*, 441 U.S. 520, 535, 539 (1979). This Court, furthermore, recently held, in a case dealing with convicted and sentenced inmates, that restrictions, similar to those imposed on the Respondents here, required some procedural protection. *See Wilkinson v. Austin*, 545 U.S. 209, 224 (2005). No circuit court that has addressed similarly restrictive conditions has held otherwise and the cases cited by the State to assert a split are factually distinct in material ways.

COUNTER-STATEMENT OF THE CASE

Respondents are three inmates who were housed as pretrial detainees in the Delaware Correctional Center ("DCC"), Security Housing Unit ("SHU") isolation tier. Pet. App. 32, 34. SHU is the most restrictive housing unit in the DCC. SHU is reserved for those inmates who have "demonstrated that they cannot be housed in a lesser security setting and/or whose behavior and history are conducive to maximum security housing." State of Delaware, Delaware Correctional Center, *available at* http://doc.delaware.gov/BOP/PrisonDCC.shtml (last visited December 19, 2007). Placement in the pre-trial SHU is indefinite, limited only by trial and sentencing or the apparent discretion of prison officials. "Inmates, other than those sentenced to the

death penalty, may earn their way out of SHU by exhibiting appropriate behavior, complying with institutional rules and participating in treatment, education, and/or work programs." *Id.* Respondents contend that detainees awaiting trial and sentencing, even for serious crimes, typically are not placed in SHU. Pet. App. 34.

The conditions in SHU are extraordinarily restrictive. Inmates in SHU:

- spend 165 out of 168 hours a week locked in their cells (leaving their cells only for recreation for 45 minutes and a shower for 15 minutes, three days a week);
- can only walk around a small steel cage for recreation and are denied access to any equipment;
- cannot possess art supplies, playing cards, or other mind stimulating activities;
- cannot watch television;
- cannot control the lights in their cells;
- are allowed one 45 minute visit a week, during which the inmate is handcuffed and shackled;
- are permitted one 10 minute phone call a week; and
- cannot attend, participate in, or watch religious services.

Pet. App. 34-36.

SHU inmates, additionally, have no physical access to the law library, but must identify and request materials that may or may not be provided. Pet. App. 35. They are allowed to possess only five cases at a time and must return these cases to get any additional ones. Inmates' access to the

commissary—where stamps, paper and envelopes may be purchased—is limited to one visit every two weeks with a fifteen dollar spending limit. Legal phone calls require twenty-four hour notice.

At the time the Complaint was filed, Respondent Michael Jones was housed in SHU while awaiting trial. Pet. App. 32-33. On or about February 19, 2003, he was moved to SHU, along with several other inmates from Gander Hill Prison, after a disruption at that facility. Pet. App. 32. All of the inmates allegedly involved in that disruption, except Jones, were moved back to Gander Hill or to the B Building pretrial detention center. Jones never received a hearing regarding his initial or continued detention in SHU, and he never received an explanation as to why he was moved to and continued to be housed at SHU, even after he asked for one. At the time the Complaint was filed, Jones had been detained at SHU for over one year. Pet. App. 32-33.

Respondents Michael Manley and David Stevenson were detained in SHU while awaiting sentencing. Pet. App. 33. Manley and Stevenson had been convicted and sentenced to death in January 1997. On or about May 30, 2001, Manley's and Stevenson's sentences were vacated and their cases were remanded for further proceedings. At that time, they were "returned to pre-trial detainee status and moved off the death row tier." Pet. App. 34. Instead of being moved to B Building, which is where other detainees who have had their death sentences vacated have been moved, Plaintiffs were moved to SHU. In December 2003, Stevenson, without explanation, was moved to a less restrictive pre-trial facility. Pet. App. 37. He was moved back to SHU

one month later, in January 2004, again with no explanation or hearing. Like Jones, Manley and Stevenson never received a hearing regarding their initial or continued detention in SHU, were never told why they are being housed in SHU, despite repeated requests, and had no opportunity to challenge their continued detention in the restrictive unit. Pet. App. 34, 37. Stevenson and Manley had been in SHU for almost three years at the time they filed their Complaint in 2004 and were ultimately held in SHU until their resentencing in February 2006, almost five years after their assignment to SHU.

Jones, Stevenson and Manley filed an action under 42 U.S.C. § 1983 on or about February 25, 2004, alleging violations of their substantive and procedural due process rights. Pet. App. 39. Respondents allege they were housed in SHU for punitive purposes and without any explanation or means to challenge their classification or the conditions of confinement. Pet. App. 34, 37.

The State filed a motion to dismiss under Rule 12(b)(6) for failing to state a claim upon which relief can be granted. The State contended that in *Sandin v. Connor*, 515 U.S. 472 (1995), this Court had held that the constitutional liberty interests afforded inmates "are limited to 'freedom from restraint' which imposes an atypical and significant hardship in relation to the ordinary incidents of prison life." Pet. App. 42 (quoting *Sandin*, 515 U.S. at 483-84). Accordingly, the State asserted that Respondents had no constitutionally protected interest at stake and had failed to state a due process claim. The district court granted the State's motion to dismiss, holding

that Respondents failed to allege a facially valid cause of action.

The Third Circuit unanimously reversed and remanded. Pet. App. 2. The court held that because Respondents, as the State has conceded, were pretrial detainees, the district court had erroneously relied upon *Sandin*, 515 U.S. 47, a post-sentencing case, to conclude that Respondents had no constitutional liberty interest at stake. Pet. App. 12 n.4. The court of appeals instead recognized that under *Bell*, 441 U.S. 520, this Court held that pretrial detainees have a substantive due process right not to be punished. Pet. App. 8. The court of appeals concluded that, under *Bell*, Respondents' allegations "intimate a degree of as yet unexplained arbitrariness in the procedures regarding placement in SHU," Pet. App. 11, and raise an "inference of impermissible punishment that precludes granting a motion to dismiss." Pet. App. 12. Although the court noted that reasonable inferences apart from punishment could be drawn from the Complaint as explanation for Respondents' confinement, the fact that such inferences could be drawn was "proof that dismissal was premature." Pet. App. 6. Respondents met their "obligation to provide grounds for . . . relief by presenting factual allegations sufficient to raise their right to relief above a speculative level." Pet. App. 6 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. ___, 127 S. Ct. 1955, 1964-65 (2007)).

The Third Circuit also held that the Complaint sufficiently alleged a valid procedural due process claim. Pet. App. 2, 7, 14. The court concluded, assuming the allegations were true, that Respondents could not be held indefinitely in the

highly restrictive conditions in SHU without some non-adversarial process: "Although pretrial detainees do not have a liberty interest in being confined in the general prison population, they do have a liberty interest in not being detained indefinitely in SHU without explanation or review of their confinement." Pet. App. 14. Recognizing that the degree of process required will vary depending on the reason for the transfer, the Third Circuit remanded to the trial judge to evaluate the purposes of the restrictive confinement and the process that may be required. Pet. App. 16. The court emphasized, however, that when the transfer into such highly restrictive conditions is administrative, as the State contends, only the informal, non-adversarial process outlined by this Court in *Hewitt v. Helms*, 459 U.S. 460, 468 (1983), is necessary, and "[d]ue to the unique exigencies of prison management, . . . the minimal exchange of paperwork . . . need not occur prior to the transfer of a detainee." Pet. App. 17.

REASONS FOR DENYING THE WRIT OF CERTIORARI

There is no compelling reason to review the Third Circuit's fact bound, interlocutory decision that Respondents have alleged claims sufficient to survive a motion to dismiss. With respect to Respondents' substantive due process claim, the State does not contend the courts are confused on whether pretrial detainees may be punished; the State itself concedes the legal point. The Third Circuit did not even conclude that a substantive due process violation had occurred. The entire dispute is over whether Respondents' specific factual allegations of punitive

confinement should survive a Rule 12(b)(6) motion. Furthermore, because the record is not developed and the State has conceded the general legal issues, the Petition presents a poor vehicle for review.

Nor is there any reason to address the Third Circuit's remand of the procedural due process claim. The court's conclusion that Respondents' liberty interests are implicated follows, in part, from the conclusion that a valid substantive due process claim of improper punishment has been alleged. Moreover, the highly restrictive conditions of confinement themselves, even absent an allegation of punishment, support the procedural due process claim. There is no split or demonstrated confusion regarding the scope of procedural due process in any of these contexts. The State cited cases from other circuits that dealt with factually different situations. Not one case involved the type of highly restrictive conditions imposed on the pretrial detainees here. Indeed, the precedent from each of these circuits indicates that if faced with a similar set of facts they would resolve the issue as the Third Circuit did. Likewise, there is no well-defined or developed split among the courts regarding whether *Sandin* applies to pretrial detainees. Every court that has examined the issue has concluded, as the Third Circuit did, that *Sandin* does not apply. The State's alleged split consists of a few unpublished dispositions in which the courts cited *Sandin*, without analysis, in cases involving pretrial detainees. Such unexplained citations do not create a split warranting this Court's attention.

Finally, this decision does not interfere with the State's administration of its prisons. The court

did not prohibit the State from housing detainees in SHU or impose restrictions on what conditions the State may impose. The court simply noted that when pretrial detainees are to be subjected to indefinite confinement—in this case almost five years—in highly restrictive, allegedly punitive conditions, some minimal process is necessary. The process outlined by the court, informing the detainee of the purpose of his confinement in SHU and allowing the detainee to respond, will have a minimal effect on prison management. Many states, in fact, already appear to have such procedures in place.

ARGUMENT

I. THE THIRD CIRCUIT'S CONCLUSION THAT RESPONDENTS ALLEGED A VALID SUBSTANTIVE DUE PROCESS CLAIM SUFFICIENT TO SURVIVE A MOTION TO DISMISS DOES NOT WARRANT THIS COURT'S REVIEW.

A. The Petition Does Not Present A Certworthy Legal Question.

The State mischaracterizes the nature of the Third Circuit's opinion. The State presents the question as whether "[c]ertiorari should be granted to review the Third Circuit's ruling that Respondents' substantive due process rights were violated when they were transferred to the security housing unit." Pet. 23. This question is not presented.

The Third Circuit did not hold that Respondents' substantive due process rights were violated. Nor did the court hold that the State was unjustified in detaining Respondents in SHU. The Third Circuit, instead, held only that Respondents "met their obligation to provide grounds for their entitlement to

relief by presenting factual allegations sufficient to raise their right to relief above a speculative level." Pet. App. 6 (citing *Twombly*, 550 U.S. ___, 127 S. Ct. at 1964-65). The court expressly acknowledged that the State's factual assertions regarding the nature of Respondents' confinement were "legitimate inference[s]," but that such competing inferences underscored that the dismissal was premature. Pet. App. 5-6. The Third Circuit, in other words, decided that these Respondents had pled enough facts about their individual circumstances to survive a Rule 12(b)(6) motion to dismiss, but conceded that the State may ultimately be correct on the merits. This initial fact bound determination does not warrant review.

1. The Petition, in fact, does not raise a dispute over a constitutional standard at all. The State concedes under this Court's precedent that Respondents, as pretrial detainees, may not be punished. Pet. 8, 23; Pet. App. 40; *Bell*, 441 U.S. at 535. As this Court has recognized, both the nature and condition of the confinement, as well as the State's motives, are relevant in determining whether a particular inmate was punished. *Bell*, 441 U.S. at 538-39. This Court further held in *Bell* that "a court may permissibly infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees" if the "restriction or condition" is "arbitrary." *Id.* at 539.

Applying this Court's precedent, the Third Circuit held that under the facts alleged, "dismissal was improper" at the motion to dismiss stage "[b]ecause the District Court could not make either an objective

inquiry into the severity of the deprivations or a subjective inquiry into the mental state of the officials." Pet. App. 11.[1] The court also concluded that the Complaint raised issues of "unexplained arbitrariness" on the part of the State. Pet. App. 11. Rather than a legal dispute, this Petition raises merely a dispute over the factual sufficiency of Respondents' allegations.

The Third Circuit's opinion is in line with decisions from other circuits, which have held that when determining whether restrictions are punitive or retaliatory, the motivations of detention officials and circumstances surrounding the restrictions are paramount, as "the same conduct may be the basis for either nonpunitive, regulatory restrictions or punitive sanctions." *Rapier v. Harris*, 172 F.3d 999, 1005 (7th Cir. 1999); *see Surprenant v. Rivas*, 424 F.3d 5, 14-15 (1st Cir. 2005). These determinations, as other circuits have agreed, cannot always be determined at the motion to dismiss stage. *See, e.g.*, *Magluta v. Samples*, 375 F.3d 1269, 1275 (11th Cir. 2004) (reversing grant of motion to dismiss because motivation of prison officials could not be determined).

2. Nor is there a dispute over the appropriate legal standard to apply to a motion to dismiss. The Third Circuit cited this Court's decision in *Twombly*, noting that the allegations in this Complaint were more than mere speculation, and distinguished its own precedent in *Evancho v. Fisher*, 423 F.3d 347 (3d Cir.

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[1] To be sure, the State submitted a conclusory *factual* affidavit disputing the factual allegations in the complaint. Pet. App. 52.

2005), which requires the court to dismiss complaints based only on conclusory, rather than substantiated, factual allegations. The court concluded that this Complaint, for the reasons stated below, was sufficient, particularly in light of the lower standard of pleading that applies to *pro se* plaintiffs, to survive a motion to dismiss. Pet. App. 3-4. These legal standards are uncontroverted. The State's sole contention is that the Third Circuit erred in applying this legal standard to the particular facts alleged in Respondents' Complaint.

B. Respondents Alleged A Factually Sufficient Substantive Due Process Claim.

The court of appeal's decision that dismissal was premature in this case is undoubtedly correct. The Complaint here, as the Third Circuit recognized, is replete with allegations and inferences that raise questions of fact. Respondents allege that the move to SHU was "punitive" and request that the State be enjoined from further "retaliatory practices." Respondents further allege that the conditions in SHU are extremely restrictive. Respondents contend they were locked in their cells 165 out of 168 hours a week—one of them for over a year while awaiting trial and two of them for almost three years while awaiting sentencing.[2] Respondents had no access to exercise equipment and their only recreation was to walk around a steel cage for 45 minutes three times a week. Respondents were denied religious services, even through television, the entire time. They had

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[2] The length of Plaintiffs' detention is relevant to the question of punishment. *Cf. Hutto v. Finney*, 437 U.S. 678, 687 (1978) (noting that unpleasant conditions "might be tolerable for a few days and intolerably cruel for weeks and months").

no physical access to the library and were limited to only receiving materials that they had specifically identified. They were allowed only one visit per week during which time Respondents were handcuffed and shackled. The State itself implies that it uses these restrictive conditions in SHU as punishment, stating on its website that SHU inmates may "earn" the right to return to medium security or general population through good behavior. State of Delaware, Delaware Correctional Center, *available at* http://doc.delaware.gov/BOP/PrisonDCC.shtml (last visited December 19, 2007).

Respondents' allegations that not all similarly situated inmates were housed in SHU further cast doubt on the motives of the state officials. Respondents allege that other inmates who had been convicted of first degree murder and who had death sentences vacated were not housed in SHU. Respondents also allege that they, too, were housed at different times in less restrictive confinement. Respondent Jones alleges that he was housed in the Gander Hill Prison and transferred to SHU, without any explanation or process, only after a disturbance at that facility. All of the other inmates who had been moved to SHU after the disruption, with the exception of Jones, were moved back to Gander Hill or to the B Building pretrial detention center; only Jones was kept in the highly restrictive SHU. Respondent Stevenson also was moved to a less restrictive pretrial facility in December 2003, after his death sentence had been vacated. He was then, without explanation, moved back to SHU one month later in January 2004. The fact that two of the Respondents themselves were housed—in one case even after a determination of guilt and the

imposition of a death sentence—in much less restrictive housing belies the State's assertion that Respondents were placed in SHU solely for security concerns based on their background and warrants further inquiry by the trial court.

C. This Petition Presents A Poor Vehicle To Address Any Substantive Due Process Claims.

This Court, if it were to grant this Petition, would be unable to address with precision any substantive due process claim because of the procedural status of this case. As noted above, even if the Court wanted to address the substantive due process questions as urged by the State, those questions are not presented by this preliminary appeal based on the Rule 12(b)(6) pleading standard. The trial court did not make a determination regarding whether a substantive due process violation occurred. At this stage, the facts regarding the nature and severity of the conditions in SHU and the State's motives for placing Respondents in SHU are still unknown and undeveloped. The Court would have great difficulty in clarifying any substantive legal issues at this stage of the proceedings.

The Court also would have difficulty in addressing the actual question presented: whether Respondents pled sufficient facts to survive a Rule 12(b)(6) motion. As the Third Circuit pointed out, the State concedes that "the complaint alleges that 'Plaintiffs weren't given an explanation for the punitive move.'" Pet. App. 4. The State further concedes, as mentioned above, that punishment is inappropriate for pretrial detainees and that Respondents were in fact pretrial detainees. Pet. App. 8, 40. Under these circumstances, even if the Court were inclined to

address the pleading requirements of *pro se* plaintiffs in the substantive due process context, the inquiry would be exceedingly limited by the State's own concessions on both the facts and substantive law.

II. THE THIRD CIRCUIT'S CONCLUSION THAT RESPONDENTS ALLEGED A VALID PROCEDURAL DUE PROCESS CLAIM SUFFICIENT TO SURVIVE A MOTION TO DISMISS DOES NOT WARRANT THIS COURT'S REVIEW.

The Third Circuit's conclusion that Respondents alleged a valid procedural due process claim similarly does not warrant review. The court, contrary to the State's argument, did not hold that Respondents were improperly placed in SHU or that SHU is inappropriate for some pretrial detainees. Indeed, the court recognized that legitimate institutional interests, including safety and security, may justify the highly restrictive conditions in SHU. Pet. App. 5-6, 15. The Third Circuit simply held, consistent with this Court's precedents, that some minimal legal process be provided if the State wishes to impose these highly restrictive conditions of confinement indefinitely. Pet. App. 16-17; *see also Hewitt*, 459 U.S. at 477 n.9 (noting that "administrative segregation may not be used as a pretext for indefinite confinement" and that "[p]rison officials must engage in some sort of periodic review of the confinement"). This decision is consistent with this Court's precedent and does not create a split among the courts of appeals.

A. Respondents Alleged A Valid Due Process Claim Based On The State's Alleged Punishment.

The Third Circuit, consistent with this Court's precedent, held that Respondents have alleged a valid "liberty interest in being free from punishment while awaiting sentencing and in not being held in the SHU indefinitely." Pet. App. 7. Either of these alleged liberty interests is sufficient to survive a Rule 12(b)(6) motion, because, as this Court has held, some procedural due process protections attach when the State infringes on a constitutionally protected liberty interest. *Hewitt*, 459 U.S. at 466; *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). The Third Circuit's holding that Respondents have alleged a valid *procedural* due process claim thus, in part, follows from its conclusion that Respondents have alleged a valid *substantive* due process claim. Because Respondents' Complaint alleges a facially valid claim that Respondents were being unconstitutionally punished, at this stage of the case there is a clear constitutionally protected liberty interest at issue and therefore a valid claim for procedural due process.

There also has been no determination or discovery regarding the State's motives. In addition to the difficulties that will arise from the lack of factual development as noted *supra*, for purposes of procedural due process the Third Circuit noted that at least Jones's transfer to SHU raised serious questions as to whether the transfer was for purposes of discipline for violating prison rules. Pet. App. 17. This concern that Jones's assignment to SHU was disciplinary is separate from the court's concerns

that the confinement was punishment for the alleged crime itself. There is no dispute among the courts of appeals that if the State did impose highly restrictive conditions on Respondents for disciplinary reasons that some sort of procedural protection is required. *See Suprenant*, 424 F.3d at 17 (inmate placed in administrative segregation for discipline entitled to procedural process); *Benjamin v. Fraser*, 264 F.3d 175, 190 (2d Cir. 2001) ("the [formal] procedures required by *Wolff* [*v. McDonnell*, 418 U.S. 539 (1974)] apply if the restraint on liberty is imposed for disciplinary reasons"); *Mitchell v. Dupnik*, 75 F.3d 517, 524 (9th Cir. 1996) ("pretrial detainees may be subjected to disciplinary segregation only with a due process hearing"). Respondents allege that they received no process—no reason for their placement in SHU, despite repeated requests, and no opportunity to challenge their placement. These allegations raise an actionable procedural due process claim if the State's motivation was in fact for disciplinary purposes.

This case, accordingly, is a poor vehicle in which to address the State's question regarding the scope of procedural due process. The State seeks review of whether Respondents' allegations of highly restrictive, indefinite confinement raises a procedural due process claim sufficient to survive a motion to dismiss. But, unless this Court is prepared to address and reverse the pleading requirements of a substantive due process claim—notwithstanding the State's concession that the Constitution prohibits punishment of Respondents—and make the factual determination that the conditions were not disciplinary, the decision would have no effect. A valid procedural due process claim would remain.

There is no reason for this Court to grant review of an interlocutory, fact bound Petition that would not even resolve the claims before the district court.

B. Respondents Alleged A Valid Due Process Claim Based On The State's Alleged Indefinite, Highly Restrictive Confinement.

1. This Court's precedent, furthermore, supports the Third Circuit's second determination that Respondents have alleged a valid liberty interest based on the indefinite, highly restrictive conditions in SHU. This Court, in *Austin*, 545 U.S. at 220, held that *sentenced* inmates subjected to similar conditions of confinement had a "constitutionally protected liberty interest in avoiding assignment to OSP [Ohio's supermax prison]." In *Austin*, the inmates in the OSP were kept in their cell 23 out of 24 hours a day and had no control of the lights in their cells. "Opportunities for visitation [we]re rare" and inmates were deprived of almost all human contact. The inmates, who were not eligible for parole while in OSP, were placed in these conditions for an indefinite amount of time, limited only by the length of the sentence and an annual review of the assignment. *Id.* at 214-15.

This Court concluded that the nature of these conditions created a constitutionally protected liberty interest. *Id.* at 223-24. The Court emphasized that although these "harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose to both prison officials and to other prisoners[,] . . . [t]hat necessity . . . does not diminish our conclusion that the conditions give rise

to a liberty interest in their avoidance."[3] *Id.* at 224; *see also Shoats v. Horn*, 213 F.3d 140 (3d Cir. 2000) (holding that sentenced inmate had a protected liberty interest from similar restrictive custody).

The conditions in this case—as applied to pretrial detainees—are similar and actually *more* restrictive than those applied to sentenced inmates in *Austin*. In SHU, Respondents were allowed out of their cell only three hours *a week* (four hours less per week than the sentenced inmates in *Austin*). Like the inmates in *Austin*, Respondents could not control the lights in their cells and had minimal visitation rights, even with their attorneys. They were prohibited from possessing any mind stimulating activities, or attending any religious services. Respondents, even though they were awaiting trial and sentencing on first degree murder charges, were unable to visit the law library and had only limited access to materials from the library. Respondents were held indefinitely in these conditions, limited only by an eventual trial and/or sentencing. In this case, two of the Respondents were held in SHU without explanation for almost five years.

The highly restrictive conditions in SHU have far graver potential consequences on pretrial detainees than the conditions in *Austin* had on sentenced inmates. In *Austin*, the only potential consequence was that the sentenced inmates were not eligible for parole while housed in OSP. This Court, however,

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[3] Because Ohio, unlike Delaware, provides its inmates numerous procedural protections, including a three-tier classification review and another review of confinement within thirty days of arrival, the Court ultimately held that procedural due process had been met. *Austin*, 545 U.S. at 225.

has held that inmates have no right to parole. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). Moreover, because OSP houses only those inmates who have been determined through multiple layers of process to be the most dangerous inmates in the system, the possibility of parole is almost nil. Here, these restrictive conditions directly affected Respondents' ability to prepare a defense to the underlying crime and sentence in Jones's case and to the imposition of a death sentence in Stevenson's and Manley's cases. Respondents were literally fighting for their lives with great restrictions on their access to lawyers and legal materials. The harsh restrictions, while they may be necessary and ultimately may be determined to be legitimately related to institutional concerns, should not be imposed without any due process to pretrial detainees.[4]

2. The instant case is far different from the cases from this Court that the State cites, cases which dealt with administrative transfers of sentenced

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[4] The State suggests that because two of the Respondents were held on death row prior to their assignment to SHU these inmates have no constitutionally protected interests. The State's argument is wrong on numerous grounds. First, when Respondents became pretrial detainees, some of their constitutional rights were restored. They could no longer be held in punitive conditions, as they could be on death row. Second, it is the nature of the restrictions themselves, not the destination from which detainees were transferred that creates the constitutionally protected liberty interest. In *Austin*, for example, this Court did not examine the prior conditions of each inmate's confinement before determining that a constitutionally protected interest existed; this Court, instead, examined the conditions in OSP itself.

prisoners between facilities. *See* Pet. 16 (citing *Meachum v. Fano*, 427 U.S. 215, 228-29 (1976); *Montanye v. Haymes*, 427 U.S. 236 (1976); *Olim v. Wakinekona*, 461 U.S. 238 (1983)). The Court held in these cases that sentenced inmates did not have a constitutional interest in being confined in a particular prison population or facility. Not one of these cases dealt with pretrial detainees. Additionally, these cases did not address the imposition of highly restrictive and allegedly punitive conditions of confinement, such as the Court addressed in *Austin* and that are present here. The Third Circuit made the distinction between the administrative transfer cases and this case clear, holding that "although pretrial detainees do not have a liberty interest in being confined in the general prison population, they do have a liberty interest in not being detained indefinitely in the SHU without explanation or review of their confinement." Pet. App. 14.

C. There Is No Circuit Split Regarding Pretrial Detainees' Right To Due Process When Subjected To Highly Restrictive, Punitive Conditions.

1. The Third Circuit did not create or enhance a circuit split regarding the protection of the due process rights of pretrial detainees. The State contends a split now exists between the Third Circuit and the Second, Sixth, Seventh and Ninth Circuits. Pet. 9-12. The State's cases, however, do not demonstrate a split on the law, but merely demonstrate that given different facts, different outcomes will occur.

The State's citation to *Crane v. Logli*, 992 F.2d 136 (7th Cir. 1993), for example, is inapposite to the questions presented in this case. *Crane* dealt with a situation where a court failed to issue a mandate and the prisoner's transfer from maximum security was delayed. *Id.* at 137-38. *Crane* did not involve the lengthy, indefinite, allegedly punitive detention at issue here; it involved a delay in housing status while the prison awaited the court's mandate. Additionally, the Seventh Circuit had concluded that the inmate was *not* a pretrial detainee. *Id.* at 139. This holding directly conflicts with the State's concession in this case that Respondents *are* pretrial detainees.[5] Pet. App. 8. Pretrial detainees, under this Court's precedent, have greater constitutional rights than sentenced and convicted inmates, including the right to be free from punishment.[6] *Bell*, 441 U.S. at 535. In fact, in a later opinion dealing with pretrial detainees, the Seventh Circuit held that a pretrial detainee confined in solitary confinement for 270 days, with no phone or

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[5] Although there may be some disagreement between the Seventh and Third Circuits regarding the definition of pretrial detainees, the State conceded that Respondents were pretrial detainees and the Third Circuit noted that concession in its opinion. Pet. App. 8. Respondents' status as pretrial detainees is not before this Court.

[6] The State's citation to a district court opinion within the Third Circuit that the *Crane* court relied upon serves the State no better. Even if *Getch v. Rosenbach*, 700 F. Supp. 1365 (D.N.J. 1988), could support the State's argument, that decision obviously would have been at least implicitly overruled by the Third Circuit's decision here. Moreover, the court in *Getch* expressly noted that the plaintiff failed to even argue that he was subjected to punitive conditions. *Id.* at 1370-71 & n.18.

commissary privileges, no writing materials, and no recreation was entitled to some procedural process. *Rapier*, 172 F.3d at 1002.

Nor is there a demonstrated split with the Sixth Circuit. *Martucci v. Johnson*, 944 F.2d 291 (6th Cir. 1991), which the State contends evidences a split, dealt with the procedural due process rights of a detainee who was placed in segregated confinement for eight days because reliable sources had warned that the detainee was planning an escape. The court there affirmed the grant of summary judgment because the developed record did not demonstrate any arbitrariness and the action was reasonably related to the legitimate institutional objectives. In contrast, here, the Third Circuit expressly concluded that there are questions of arbitrariness that require further factual development. Moreover, after *Martucci*, when the Sixth Circuit was faced with restrictions similar to those here, as described *supra* in discussing this Court's opinion in *Austin*, the Sixth Circuit concluded that sentenced inmates did possess a constitutionally protected liberty interest in avoiding assignment to OSP. *Austin v. Wilkinson*, 372 F.3d 346, 355 (6th Cir. 2004), *aff'd in part, rev'd in part, by Wilkinson v. Austin*, 545 U.S. 209 (2005).

The State's citation to unpublished opinions in the Second and Ninth Circuits also does not indicate a split. The State's Ninth Circuit cases dealt with routine classification decisions—for which the State already provided hearings—and did not indicate that pretrial detainees would be held in conditions remotely similar to those here. The Second Circuit opinion only held that there was no evidence that the maximum security classification in that case was

unconstitutional punishment under *Bell*. *McMillian v. Cortland County Corr. Facility*, 198 F.3d 234 (table), 1999 WL 753336, *1 (2d Cir. 1999). Both of these circuits have later applied, in published opinions, the *Bell* standard and required procedural protection for disciplinary conditions. *See Benjamin*, 264 F.3d at 183, 188; *Mitchell*, 75 F.3d at 524 n.4; *see also Toussaint v. McCarthy*, 801 F.2d 1080, 1100 (9th Cir. 1986) (holding that initial determination to place a prisoner in administrative segregation requires informal nonadversary hearing within a reasonable time after the prisoner is segregated).

Finally, even assuming *arguendo* that a circuit split does exist, this issue is not ripe for consideration. The asserted split is shallow—according to the State at most only four-to-one—and the circuits have not engaged in any debate or discussion regarding the relative merits of the two positions. The split also would appear to be stale as the two principal cases relied upon by the State are from 1993 and 1991. The landscape of due process rights has been clarified since that time, most notably by *Austin*, which dealt with restrictions similar to SHU here. Further percolation is warranted to determine how the debate develops and to clarify any disagreement on the legal issues.

2. There also is no developed split regarding whether *Sandin v. Conner*, 515 U.S. 472 (1995), applies to claims by pretrial detainees. The State contends there is a four-to-three circuit split on this issue. The five circuit courts that have actually *discussed* the issue and *examined* whether *Sandin* should apply to pretrial detainees, however, have concluded that *Sandin* does not apply to their claims.

See Suprenant, 424 F.3d at 17 ("The courts of appeals that have addressed this question are consentient on the point" that the *Sandin* rationale does not apply to pretrial detainees.); *Benjamin*, 264 F.3d at 189 ("*Sandin* does not apply to pretrial detainees") (internal quotations marks omitted); *Fuentes v. Wagner*, 206 F.3d 335, 341-42 n.9 (3d Cir. 2000) ("*Sandin* does not apply here [to the procedural due process claim of a pretrial detainee]."); *Rapier*, 172 F.3d at 1002 n.2 ("[N]othing in the Supreme Court's decision in *Sandin v. Conner* [ ] alters this fundamental proposition" that a pretrial detainee may not be subjected to any form of punishment for the crime for which he is charged); *Mitchell*, 75 F.3d at 524 ("*Sandin* thus recognizes that its rationale regarding incarcerated prisoners is not applicable to pretrial detainees. *Sandin* leaves *Bell v. Wolfish* untouched.").

The State's alleged split is based on unpublished dispositions in three other circuits that did *not* discuss the issue and did *not* examine whether *Sandin* should apply. Pet. 13. The three opinions relied on by the State are similar in their brevity. The entire due process discussion, as well as the holding, in each case was limited to one or two sentences. Although the courts cite *Sandin* in dealing with pretrial detainees' claims, not one of these unpublished dispositions actually discussed whether *Sandin* should apply and none of them provides any indication that the court considered that there was a question regarding whether *Sandin* should apply. None of these opinions reveals whether, if the courts had considered the question, they would have chosen to apply *Sandin* to the procedural due process claims of pretrial detainees.

It is thus not clear that there is any real disagreement among the circuits that *Sandin* should apply.

D. The Minimal Process Afforded By The Third Circuit Would Not Interfere With Prison Administration Or Discretion.

The minimal legal process suggested by the Third Circuit would not interfere with the State's administration of its prisons. The Third Circuit did not mandate a balancing test or substitute its judgment for that of prison officials. The court, rather, emphasized that prison officials have wide discretion in making housing and security decisions. Pet. App. 18. Under the Third Circuit's opinion, the State need only notify the detainee of reason for the imposition of the highly restrictive conditions and provide an opportunity to respond. Pet. App. 15. This minimal process merely ensures that the State does not act arbitrarily or for purposes of punishment and helps ensure that factual mistakes are not made (*e.g.*, an alleged shoplifter is not accidentally incarcerated in SHU because he has the same name as another violent inmate).[7]

The State's contention that procedural process would be entirely superfluous demonstrates the reason why such process is necessary. The State suggests that because Respondents were charged with first degree murder, any process would be a

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[7] In cases where the transfer is not administrative, but related to discipline, consistent with this Court's opinion in *Wolff*, the court also noted additional process may be needed. Pet. App. 16-17. Because the factual record has not been developed, the reasons for the transfers and the exact nature of the procedures has not and cannot be determined.

"meaningless paperwork task." Pet. 22. Apparently, according to the State, because Respondents were charged with a serious crime, the State may impose any conditions on them for any reason without any procedural protection. Such a contention is directly contrary to this Court's opinion in *Bell* and the law in every circuit to have addressed it. Restrictions on the inmate must be reasonably related to legitimate governmental objectives, which, the Third Circuit concluded, it was unable to determine based on the current record. Pet. App. 18. Indeed, under the particular circumstances of this case, the State's actions appear particularly arbitrary and troubling, as conditions of confinement of at least two of the detainees allegedly *did change*, even though the charge against them did not. Pet. App. 32, 37. Under the allegations of the Complaint, the serious charges against Respondents apparently were not the determinative factor in placing them in SHU as the State has previously represented.

The process suggested here, in fact, is less intrusive than the process provided to the sentenced inmates in *Austin*. In *Austin*, as noted *supra*, Ohio provided multiple levels of initial procedures, appeals and additional reviews of the necessity of the confinement. *Austin*, 545 U.S. at 216-17; *see also Shoats*, 213 F.3d at 142 (inmates received notice of reasons for administrative custody, a hearing, the opportunity to appeal, and review of their status). Indeed, numerous other states already provide their inmates—and most importantly their pretrial detainees—similar minimal due process before imposing highly restrictive confinement. *Compare Jordan v. Fed. Bureau of Prisons*, 191 F. App'x 639 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 2875 (2007);

Jones v. Baker, 155 F.3d 810, 811-12 (6th Cir. 1998); *Brown v. Plaut*, 131 F.3d 163, 170 (D.C. Cir. 1997). Even the cases cited by the State in its Petition indicate the presence of some regular process when detainees are placed in restrictive housing. *See Garcia v. Pugh*, 8 F.3d 26 (table), 1993 WL 362268, *1 (9th Cir. 1993) (classification hearings conducted); *Alexander v. Frank*, 967 F.2d 583 (table), 1992 WL 149679, *1 (9th Cir. 1992) (detainee received numerous classification hearings). There is no reason Delaware cannot provide some minimal process too.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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In The
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THOMAS CARROLL, WARDEN OF
THE DELAWARE CORRECTIONAL CENTER,

Petitioner,

v.

DAVID STEVENSON, MICHAEL
MANLEY, MICHAEL L. JONES,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Brief in Opposition oversimplifies the issues in this case and avoids addressing the actual procedural rule issued by the Third Circuit. It asserts that Warden Carroll concedes that punishment of detainees is constitutionally prohibited, and for that reason "the State has conceded the general legal issues" in this case and the Petition "does not raise a constitutional issue at all." (Opp. Br. at 8, 10).

REASONS FOR GRANTING THE WRIT

I. Procedural due process for detainees: there is a need for the Court to clarify the law.

In their Brief in Opposition, Respondents assert that the law in this area is not confused. In fact, from Respondents' assertions, one may conclude the law is as well ordered as it could be. The circuits are all in agreement on a rule of law that is workable and makes sense. (Opp. Br. at 11).

The law in this area is not well defined. No circuit has adopted *Stevenson*'s rule of law – that transfers of detainees to higher security housing generally require due process at or about the time of the transfer. No precedent from this Court supports a finding of a general rule that transfers of detainees into more restrictive housing for an indefinite period require due process procedures. And there is confusion among

the district courts. Several have remarked upon the existence of confusion in this area.

A. *Stevenson*: detainees placed in highly secure housing are generally entitled to due process.

The Third Circuit's procedural rule in *Stevenson* is overly broad. By focusing on the "indefinite" nature of the Respondents' placement in the Security Housing Unit ("SHU"), and requiring due process at or about the time of transfer, the court has devised a rule that sweeps in virtually all administrative transfers of detainees to high security custody.

Finding a liberty interest based on the Respondents' duration in SHU, the *Stevenson* court applies the due process requirements retroactively, so that the duty to give notice and allow a response arose at the time of the transfer. It is illogical that due process requirements arise years in advance of the time duration that gives rise to these requirements. Of course, the Warden here had no way of knowing when the Respondents would be resentenced. Thus, any detainees transferred administratively for other than a definite and very short time period must be treated as if they have due process rights. In fact, the *Stevenson* opinion states this as a rule. (Pet. App. 15-16). When *Stevenson* is viewed this way, the authorities from other circuits relied upon by Respondents do not support such a rule.

B. There is little or no support in other circuits for *Stevenson*'s procedural rule of law.

Contrary to Respondents' assertions, one cannot find another circuit with a general rule that transfers of detainees into more restrictive housing require due process. Rather, cases on this issue from other circuits hold that administrative transfers of detainees generally do not require due process. *See Martucci v. Johnson*, 944 F.2d 291 (6th Cir. 1991); *Holly v. Woolfolk*, 415 F.3d 678, 679 (7th Cir. 2005); *Higgs v. Carver*, 286 F.3d 437, 438 (7th Cir. 2002); *Zarnes v. Rhodes*, 64 F.3d 285 (7th Cir. 1995); *Crane v. Logli*, 992 F.2d 136 (7th Cir. 1993). *See also, Miramontes v. Chief of Department of Corrections*, 86 Fed. Appx. 325 (9th Cir. 2004); *Alexander v. Frank*, 967 F.2d 583 (table), 1992 WL 149679 (9th Cir. June 30, 1992); *Stafford v. Edmonds*, 76 F.3d 380 (table), 1996 WL 38222 (6th Cir. Jan. 30, 1996); *Franklin v. True*, 76 F.3d 381 (table), 1996 WL 43532 (7th Cir. Jan. 30, 1995). Although the duration of segregation housing in those cases is not equal to the 32 months in *Stevenson*, the Third Circuit in *Stevenson* did not restrict its holding to segregation housing for such a period. Rather, the opinion holds that due process must be given at or about the time of any transfer to more restrictive housing for an indefinite period. Where prison officials do not know how long the transfer will last, they are compelled to provide due process as a matter of course. This holding is not consistent with

the holdings of other circuits on the issue of administrative transfers.

It is in the nature of administrative transfers not to know how long they will last. Unlike disciplinary transfers, which are intended for short, specific time periods, administrative transfers are done for security or safety concerns that are not easily resolved in a given time frame or subject to prediction.

In their Brief in Opposition, Respondents attempt to explain away the broad sweep and inconsistency of the Third Circuit's decision in *Stevenson* by asserting that:

> The Third Circuit made the distinction between the administrative transfer cases and this case clear, holding that "although pretrial detainees do not have a liberty interest in being confined in the general prison population, they do have a liberty interest in not being detained indefinitely in the SHU without explanation or review of their confinement."

(Opp. Br. at 21, quoting Pet. App. 14). This attempt ignores the procedural rule that the Third Circuit issued even with respect to virtually all administrative transfers: "Prison officials must provide detainees who are transferred into more restrictive housing for administrative purposes . . . an explanation of the reason for their transfer as well as an opportunity to respond." (Pet. App. 15). Thus, under the Third Circuit's rule, even if the district court finds that the

transfer was not disciplinary, the Respondents are still entitled to due process, as are all other detainees who are administratively transferred for a period that is not time-certain.

C. *Wilkinson v. Austin* does not support the Third Circuit's rule in *Stevenson*.

Meachum v. Fano, 427 U.S. 215, 228-29 (1976), established that, in the absence of a state-created interest, prisoners transferred to higher security housing generally do not have a liberty interest in due process procedures with respect to their transfer. *Bell v. Wolfish,* 441 U.S. 520, 545-46 (1979), extended this principle to detainees, finding that lawful incarceration itself extinguishes the general liberty interest with respect to prison conditions that a non-incarcerated person enjoys.[1]

Wilkinson v. Austin, 545 U.S. 209 (2005), did not overrule *Meachum*, and in fact it explicitly reaffirmed it. *Id.* at 221. In *Wilkinson,* Ohio prison regulations provided procedural protections to prisoners transferred into Ohio's "supermax" prison, and the *Wilkinson* opinion stated that its finding of an "atypical and significant hardship" with respect to supermax placement was based on a "state-created" liberty interest:

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[1] *See* the *amicus* brief filed by the Commonwealths of Pennsylvania and Puerto Rico and the States of Alaska, Colorado, Hawaii, and New Hampshire in support of the Petition for a more extended discussion of this point. *Amicus* brief at 5-6.

> [T]he Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement. [*Meachum v. Fano* citation.] . . . We have also held, however, that a liberty interest in avoiding particular conditions of confinement may arise from state policies or regulations, subject to the important limitations set forth in *Sandin v. Connor*, 515 U.S. 472 (1995).
>
> * * *
>
> " . . . The time has come to return to the due process principles we believe were correctly established and applied in *Wolff* [*Wolff v. McDonnell*, 418 U.S. 539 (1974)] and *Meachum*. Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will generally be limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." [Citation to *Sandin* omitted.]

545 U.S. at 221-23. Thus, it appears, contrary to Respondents' assertion, that the existence of a state-created liberty interest – or lack thereof – is still the departure point for liberty interest analysis. In the instant case, the district court went through this analysis and concluded that the State of Delaware did not create any liberty interest for the Respondents in the context of their confinement in SHU. (Pet. App. 23).

Even if conditions alone can create a liberty interest regardless of state law, *Wilkinson* did not fashion a general rule that a transfer to highly restrictive conditions for an indefinite period creates a liberty interest. The Court was careful to emphasize that it was the totality of all factors, including the impact on parole eligibility, that led to the conclusion there was a liberty interest. *Id.*, 545 U.S. at 224.

Moreover, the Court emphasized in *Wilkinson* that an "indefinite" transfer meant potentially for the rest of the prisoner's life:

> . . . [P]lacement at OSP [Ohio's supermax prison] is for an indefinite period of time, limited only by an inmate's sentence. For an inmate serving a life sentence, there is no indication how long he may be incarcerated at OSP once assigned there.

545 U.S. at 214-15. In this context, "indefinite" means potentially perpetual. However, as used by the Third Circuit in the instant case, "indefinite" transfer means merely the absence of a time-certain period. When the period is defined by the waiting period before resentencing, one would expect that period to be no more than a few months or a few years at most. The extended period that occurred in this case, involving the death penalty, is highly unusual.

The ambiguous meaning of "indefinite" has made the Third Circuit's holding more pernicious than it otherwise would be: the holding sweeps in virtually all administrative transfers of detainees, which by their nature are for indefinite periods.

D. District Court confusion.

If the law is clear and consistent as Respondents suggest, we would not expect to find any concerns about confusion expressed in district court opinions. However, several district courts have observed that there is confusion and inconsistency in this area. *See Rodriguez v. Penobscot County Jail*, 2001 WL 376453 at *3-*4 (D. Me. Apr. 11, 2001) (finding law is unclear for purposes of qualified immunity); *Cornett v. Webb*, 2004 WL 3437504 at *5 (E.D. Ky. May 13, 2004) (noting conflict among circuits and applying *Bell*, *Hewitt v. Helms*, 459 U.S. 460 (1983), and *Sandin* analysis to find no liberty interest); *Walton v. NFN Douglas*, 2006 WL 1751735 at *5 (D.S.C. June 23, 2006) (noting "conflicting views" of whether disciplinary segregation of detainee entitles him to due process).

E. The *Stevenson* opinion makes little sense.

Finally, it is critical whether the Third Circuit's procedural rule of law in *Stevenson* makes sense and whether it is workable.

The *Stevenson* opinion does not make sense. It makes little sense that a prisoner is being punished by being moved off death row, that a prisoner needs procedural protections when being moved off death row, or that it is irrational or excessive for prison officials to place a convicted first-degree murderer awaiting a redetermination of the death penalty in a

high security housing area.[2] Even where a prisoner in his complaint uses the term "punishment" or alleges other prisoners were treated differently, it still makes little sense.

Stevenson's rule of law is not workable. In most instances, prison officials cannot know how long a detainee being transferred administratively will be in the more restrictive housing unit. Adopting a general rule of due process procedures for administrative transfers would be unnecessarily burdensome.

II. Substantive due process for detainees: there is a need for the Court to clarify that a detainee's bare allegation of punishment or dissimilar treatment, even coupled with restrictive housing conditions, fails to state a substantive due process claim.

Respondents assume that any allegation of punishment or dissimilar treatment, coupled with restrictive housing conditions, states a substantive due process claim. In fact, a bare allegation of punitive or malicious intent or dissimilar treatment is

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[2] Respondents greatly emphasize that the Petitioner conceded the Respondents' detainee status. Although the Warden concedes that Respondent Jones is a detainee under any commonly used definition, as to Stevenson and Manley he concedes only that they are detainees under Third Circuit precedent. Warden Carroll has not focused his defense on their status because the outcome of this appeal should not turn thereon.

insufficient to state such a claim.[3] This should be especially true where the complaint itself sets forth the reasonable relationship required under *Bell v. Wolfish, supra*.

Respondents' view is essentially the same as the minority argument in *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, 127 S. Ct. 1955 (2007). In *Twombly,* the majority rejected this position. *Id.*, 127 S. Ct. at 1965 n.3 (citation omitted). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.* at 1965. Facts that merely create "a suspicion of a legally cognizable right of action" are insufficient. *Id.* (citation omitted).

In the instant action, the Respondents have alleged: 1) a conclusory allegation of punitive or retaliatory intent by the Warden, 2) a detailed account of the conditions in SHU, which are highly restrictive, and 3) that they, and others who they believe were similarly situated, have not always been placed in such highly restrictive housing.

The first allegation is simply a legal conclusion, unsupported by anything beyond the second two sets of allegations. The second two sets of allegations do not establish a substantive due process violation other than at the speculative level.

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[3] If a mere allegation of punishment or dissimilar treatment is not enough to state a cognizable substantive due process claim, then Respondents are incorrect that this Court must make a factual determination of the Warden's intent to find the complaint fails to state a substantive due process claim.

It is not difficult to hypothesize factual allegations that actually would raise a reasonable inference of punitive intent or arbitrary imposition of harsh conditions. If the Respondents were charged with property crimes and had no history of violent conduct or escape attempts, their placement in SHU for an extended period would raise serious legal questions that probably could not be met with a Rule 12(b)(6) motion to dismiss. Instead, there is no dispute that this action concerns, *inter alia*, two convicted murderers who are being taken off death row pending a redetermination of their death-penalty sentences. In setting forth this allegation in the complaint, Respondents Stevenson and Manley have provided the reasonable relationship between their housing status and a legitimate government objective – prison security. The complaint also provides the reason for the transfer of Stevenson and Manley: when their death sentences were vacated, they were transferred off death row pursuant to "standard practice." (Pet. App. 34).

One can imagine or infer other reasons for the housing of Respondents in SHU, as the Third Circuit was willing to do and as Respondents urge this Court to do, but the allegations in this case make that inference in the realm of speculation.

It is always possible to imagine or infer an improper or arbitrary purpose behind the conduct of prison officials. In the absence of factual allegations that, if true, constitute a cognizable claim, federal courts should not feel obligated under the Federal Rules to imagine bad motives or bad conduct by

prison officials. Such inferences are not reasonable. To hold that the mere possibility of such an inference means the case must go through discovery is to hold that virtually any set of allegations by a prisoner in high security housing states a claim. If federal judicial deference to the discretion of state prison officials is a principle with any substance as a practical matter, prison officials must be freed from going through discovery in every case with detainees just because punitive intent or dissimilar treatment is alleged. These allegations are made in virtually every case.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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2007

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No. 07-575

In the Supreme Court of the United States

THOMAS CARROLL, WARDEN OF THE DELAWARE CORRECTIONAL CENTER,

Petitioner

v.

DAVID STEVENSON, MICHAEL MANLEY, MICHAEL L. JONES,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* THE COMMONWEALTH OF PENNSYLVANIA, THE STATES OF ALASKA, COLORADO, HAWAII, AND NEW HAMPSHIRE, AND THE COMMONWEALTH OF PUERTO RICO, IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Commonwealth of Pennsylvania and the amici states have a strong interest in the administration of their prisons and detention facilities. Specifically, they have an interest in maintaining high security housing for their most dangerous prisoners, including pretrial detainees who are awaiting retrial or resentencing. The Third Circuit's ruling in *Stevenson v. Carroll*, 495 F.3d 62 (3d Cir. 2007), creates a liberty interest for detainees in being housed in pretrial general population. This appears to require due process for prisoners who are not even being transferred after a sentence is vacated, as well as for those who are being transferred into pretrial high-security housing.

The Third Circuit's holding in *Stevenson* is overly broad and will require due process for all administrative transfers of detainees. Pet. App. at 15. This ruling will affect all jurisdictions in the circuit, including Pennsylvania. Due process for all administrative transfers of detainees will create an administrative burden that will not be justified by any substantial benefit for detainees, particularly in the case of prisoners who have been charged with or convicted of capital crimes who would reasonably expect to be confined in a highly secure custody status.[1]

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[1] Authority to file this brief is provided under Supreme Court Rule 37.4, which provides in pertinent part that "no motion for leave to file an *amicus* brief is necessary if the brief is presented on behalf of . . . a State, Commonwealth, Territory, or Possession when submitted by its Attorney General." Sup. Ct. R. 37.4. Counsel of Record for all parties received notice at least

SUMMARY OF ARGUMENT

The Court should grant the writ to resolve conflicts among the Court of Appeals on the questions of whether administrative transfers of pre-trial detainees implicate procedural due process concerns and the related question whether the rationale of *Sandin v. Conner* applies to them. On the first point, the Third Circuit's decision conflicts with those of the Sixth and Seventh Circuits, and on the second, the decision of the Third Circuit, together with that of the Second Circuit, is in conflict with decisions of the Sixth and Eight Circuits.

There is also confusion among the Courts of Appeals regarding the treatment of detainees in the substantive due process context. The Third Circuit has held that detainees enjoy greater constitutional protections than convicted and sentenced inmates, and this places it in conflict with decisions of the Fifth, Tenth, and Eleventh Circuits.

These issues are important to the states because the decision of the Third Circuit adds a layer of procedures applicable to the administrative transfer of pre-trial detainees which will aid the prisoners only marginally, at the cost of significant bureaucratic distractions for prison officials.

REASONS FOR GRANTING THE PETITION

The Third Circuit has announced a broad rule that all pretrial detainees have a liberty interest entitling them to notice and an opportunity to respond any

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ten days prior to the due date of the *amicus curiae's* intention to file this brief.

time they are transferred to more restrictive housing. This differs from the results reached by other courts of appeal, which have concluded that administrative transfers do not implicate pretrial detainees' liberty interests.

I. Certiorari Should Be Granted To Review The Third Circuit's Ruling That Detainees Are Entitled To Due Process When Transferred To More Restrictive Housing.

The federal courts of appeals need guidance on the requirements of procedural due process in the context of administrative transfers of detainees. Currently, it is difficult to reconcile the rationales of the different lower court decisions on this topic. These conflicting decisions suggest deep confusion among the courts as to the source and occasion of a liberty interest for detainees in the housing context.

A. The lower federal courts need guidance here.

The courts of appeals have divided both on the question whether administrative transfer of pre-trial detainees implicate due process and on whether the rationale of *Sandin v. Conner* applies to pre-trial detainees as well as convicted prisoners.

The Sixth and Seventh Circuits have held that administrative transfers of detainees generally do not implicate procedural due process concerns. *See Martucci v. Johnson*, 944 F.2d 291 (6th Cir. 1991); *Holly v. Woolfolk*, 415 F.3d 678, 679 (7th Cir. 2005); *Higgs v. Carver*, 286 F.3d 437, 438 (7th Cir. 2002); *Zarnes v. Rhodes*, 64 F.3d 285 (7th Cir. 1995); *Crane*

v. Logli, 992 F.2d 136 (7th Cir. 1993). These holdings conflict with the Third Circuit's holding in this case.

Also, as mentioned in the Petition (at 13-15), some circuits apply *Sandin v. Conner*, 515 U.S. 472 (1995), analysis to detainees while some do not. *Compare Polk v. Parnell*, 132 F.3d 33 (table), 1997 WL 778511 (6th Cir., Dec. 8, 1997) (*Sandin* analysis applied to a detainee); *Johnson v. Esry*, 210 F.3d 379 (table) 2000 WL 375269 (8th Cir., Apr. 13, 2000) (same); *with Benjamin v. Fraser*, 264 F.3d 175, 188-89 (2d Cir. 2001) (*Sandin* analysis does not apply to detainees); *Fuentes v. Wagner*, 206 F.3d 335, 341-42 n.9 (3d Cir.), *cert. denied*, 531 U.S. 821 (2000) (same).

B. The Third Circuit's ruling in *Stevenson* conflicts with this Court's ruling in *Bell v. Wolfish*.

One of the central principles of *Bell v. Wolfish* is that discomfort imposed upon a detainee due to conditions that are rationally related to a legitimate government objective does not constitute punishment. 441 U.S. 520, 537, 539-40, 545-46 n.28, 547 n.29 (1979). This principle was stated repeatedly and in various ways.

The Court noted that the principle of deference to prison officials' expertise applies equally in the context of convicted inmates and pretrial detainees. *Id.* at 547, n.29. It stated that pretrial detainees implicate security concerns to the same extent as convicted inmates do. *Id.* at 546, n.28. Detainees are lawfully incarcerated just as inmates are, and that such incarceration itself brings about many

restrictions and discomforting conditions. *Id.* at 545-46.

This principle in *Bell* was echoed in *Block v. Rutherford*, 468 U.S. 576, 587 (1984), where the Court stated, "It is no answer, of course, that we deal here with restrictions on pretrial detainees rather than convicted criminals." Despite the clarity of these principles in *Bell* and *Block*, the Third Circuit in *Stevenson* appears to be resurrecting a fundamental division between the two groups as they are impacted by prison transfer decisions.

As noted in the Petition at 16, the Court has found that prisoners have a liberty interest in administrative prison transfers and classification decisions only where state law created such an interest. *See Meachum v. Fano*, 427 U.S. 215, 228-29 (1976); *Montanye v. Haymes*, 427 U.S. 236 (1976); *Olim v. Waukinekona*, 461 U.S. 238 (1983). Although the holdings of this trio of cases were based in part on the truncation of a liberty interest by the fact of a criminal conviction, *Bell* extended this logic by stating that the fact of lawful incarceration similarly curtails a detainee's liberty interest:

> But our cases also have insisted on a second proposition: simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. "Lawful incarceration brings about the necessary withdrawal of limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." The fact of confinement as well as the legitimate

> goals and policies of the penal institutions limits these retained constitutional rights. There must be a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general applications." *This principle applies equally to pretrial detainees and convicted prisoners. A detainee simply does not possess the full range of freedoms of an unincarcerated individuals.*[2]

441 U.S. at 545-46. Since the detainee's liberty interest is curtailed by lawful incarceration, just as the convicted inmate's liberty interest is curtailed by lawful conviction and incarceration, a logical inference from *Bell* is that the holdings of *Meachum*, *Montanye* and *Olim* should apply to detainees. If so, then the Third Circuit is incorrect that detainees are entitled to due process, even in the absence of a state law-created interest, when administratively transferred to more restrictive housing.

C. This issue is important to the administration of state prisons.

The Third Circuit's holding creates a procedural due process right for all pretrial detainees at or about the time of transfer to a higher security housing area than general population, regardless of the reason for the transfer. Pet. App. at 15. Although this rule will aid detainees only marginally, it will create significant bureaucratic distractions for prison officials.

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[2] Citations omitted and emphasis added.

There are many reasons detainees may be transferred to higher security housing: a supervisor may disagree with a subordinate's initial judgment as to an individual's dangerousness, an individual may be associated with a conflict or potential conflict with other inmates indicating a need for separation, an individual may be the subject of an informant's tip about an impending incident, there may be a temporary housing shortage in one security area but not another, *et cetera*. The housing change could be for a day, a week, or a year. Any detainee should expect to experience housing transfers that are incidental to incarceration.

In a large prison or detention facility, such transfers are made with respect to thousands of prisoners. If every transfer to arguably more restrictive conditions requires due process, the administrative burden on prison officials will be increased substantially.

Further, the additional burden imposed on prison authorities will often have little or no point. The Court of Appeals has acknowledged that it will normally be easy for prison officials to show by affidavit that their administrative decisions are prompted by security concerns rather than a desire to punish, Pet. App. at 13, and in this case, the security concerns are so self evident as to require no proof. Prisoners who have been charged with or convicted of capital crimes ought to be considered security risks and ought to be housed in a highly secure environment – it would be surprising if they were not.

II. Certiorari Should Be Granted To Review The Third Circuit's Ruling That The Complaint Stated A Claim For A Substantive Due Process Violation.

There is much greater uncertainty in the law with respect to the rights of detainees than with respect to the rights of convicted inmates. The confusion among the lower courts as to how to treat detainees in the procedural due process context is mirrored in the substantive due process context. Thus, we see some circuits regarding substantive due process standards as equivalent to Eighth Amendment standards, while others reject that view. *Compare Hamm v. DeKalb County*, 774 F.2d 1567, 1574 (11th Cir. 1985) (holding that, with respect to the requirement of basic necessities of life, "the fourteenth amendment rights of detainees can be defined by reference to the eighth amendment rights of convicted inmates."); *Jordan v. Doe*, 38 F.3d 1559, 1564-65 (11th Cir. 1994) (same); *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) (same); *Lopez v. LeMaster*, 172 F.3d 756, 759 n.2 (10th Cir. 1999) (same); *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1315 (10th Cir. 2002) (same); *Hare v. City of Corinth, MS*, 74 F.3d 633, 647-48 (5th Cir. 1996) (where detainees and convicted inmates share same constitutional right, they are entitled to equal degree of protection), *with Hubbard v. Taylor*, 399 F.3d 150 (3d Cir. 2005) (detainees entitled to greater constitutional protection than convicted inmates).

Looking at both the procedural and substantive contexts, we see that some circuits place more emphasis on the proposition that prisoners, *a fortiori* including detainees, do not forfeit all constitutional

protections; others place more emphasis on the proposition that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Bell*, 441 U.S. at 545-46, quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948).

As more time passes since the *Bell* opinion was issued, the gap between the two positions with respect to detainees grows larger. In some circuits, there is a trend towards greater protection of detainees that is increasingly inconsistent with *Bell v. Wolfish*. *Compare Sistrunk v. Lyons*, 646 F.2d 64 (3d Cir. 1981) (presumption of innocence is not a source of any substantive right for detainees), with *Stevenson*.

In *Stevenson*, the complaint itself provides the reasonable relationship to a legitimate government objective: Stevenson, Manley, and Jones admit they are all charged (and two of them are both charged and convicted) with first degree murder. The decision by the Third Circuit may be viewed as an extension of the holding in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993), that notice pleading is sufficient in a Section 1983 action. Still, the principle of judicial deference to the discretion of prison officials – so stressed in *Bell v. Wolfish* – should have some bearing on the willingness of the federal courts to submit prison officials to the discovery process in every case where the term "punitive" is used, or where it is alleged that others are treated dissimilarly. At least some insubstantial prisoner complaints must be dismissed so that litigation does not become the central activity of prison officials.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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